81-2110

No.

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IN THE

Supreme Court of the United States

October Term, 1981

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,
Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

On Appeal From the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

STEVEN K. KUDATZKY
JAMES KATZ
TOMAR, PARKS, SELIGER, SIMONOFF AND ADOURIAN
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Appellant

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-5711

QUESTION PRESENTED

Whether a municipal ordinance, which requires that at least 40 per cent of all employees hired by private contractors engaged in public works construction projects for the municipality be persons who have been municipal residents for a year prior to employment, violates the Privileges and Immunities Clause, Commerce Clause, or Equal Protection Clause of the United States Constitution?

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MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

The United Building and Construction Trades Council of Camden County and Vicinity, the appellant, appeals from that portion of the final judgment of the Supreme Court of New Jersey, dated February 18, 1982, upholding the validity, under the United States Constitution, of a municipal ordinance passed by the City of Camden, and approved by the State of New Jersey, which requires that at least 40 per cent of the employees hired by private contractors engaged in public works construc-

tion projects for the city be municipal residents for one year prior to employment.[1] This Jurisdictional Statement is submitted to demonstrate that the United States Supreme Court has jurisdiction of this appeal and that a substantial question is presented warranting plenary review.

OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982, is reported at 88 N. J. 317 (1982), and is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Notice of Appeal and this Jurisdictional Statement was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(2). See *Erznoznik v. City of Jacksonville*, 422 U. S. 205, 207 n.3 (1975).[2]

---

1. In the same opinion, the New Jersey Supreme Court also upheld a challenge to the Camden City ordinance which established a 25 per cent minority hiring goal for private contractors engaged in public works construction projects for the city. The appellant is not appealing that portion of the lower court's decision.

2. Appellant believes that the jurisdiction of this Court is properly invoked under 28 U. S. C. § 1257(2). However, if this Court does not agree, Appellant respectfully requests that its Jurisdictional Statement be treated as a Petition for a Writ of Certiorari to the New Jersey Supreme Court.

CONSTITUTIONAL PROVISIONS, ORDINANCE AND STATUTE INVOLVED

United States Constitution, Article IV, § 2, Cl. 1:

"The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Article I, § 8, cl. 3:

"The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ."

United States Constitution, Fourteenth Amendment, § 1:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The ordinance of the City of Camden whose constitutional review is sought is set forth in its entirety as Appendix C. In relevant part, it provides as follows:

> Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.[3]
>
> C. *Developer/Contractor's Contracting Obligations.*
>
> b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event,

3. App. 54-55.

shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden.[4]

I. *Definitions.*

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the period of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence.[5]

This municipal ordinance was approved by the Chief Affirmative Action Officer of the Department of the Treasury, State of New Jersey, acting pursuant to N. J. S. A. 10:5-32 and 36(c) and N. J. A. C. 17:27-6.5.[6]

4. App. 56.

5. App. 38.

6. App. 62.

STATEMENT OF THE CASE

The appellant, the United Building and Construction Trades Council of Camden County and Vicinity (hereinafter referred to as the "Council") seeks to appeal from a judgment of the Supreme Court of New Jersey (App. 1-32), upholding the constitutionality of a Camden City resident preference ordinance, which requires that at least 40 per cent of the workers hired by private contractors engaged in public works construction contracts for the City be municipal residents for one year prior to employment.

The Council is a non-profit association of labor organizations which represent employees in the building and construction trades in Camden, Burlington, Gloucester, Salem and Cumberland Counties in New Jersey. Employees who are members of the Unions which comprise the Council include persons who reside in the City of Camden, persons who reside in New Jersey but outside the City of Camden and persons who reside outside the State of New Jersey.[7] These individuals are employed by various construction contractors who work in all counties where the Council has territorial jurisdiction and who have performed and will continue to seek to perform work on construction projects in the City of Camden. Many are "steady hands" who regularly work for such contractors and move with them from project to project, and many perform extremely specialized tasks.

The 1975 amendments to the New Jersey Law Against Discrimination sought to establish a comprehensive affirmative action program in the awarding of public works contracts. *L.* 1975, C. 127, N. J. S. A. 10:5-31 to 38. Pur-

7. Due to its location on the Delaware River, immediately across from Philadelphia, Pennsylvania, Camden, New Jersey is readily accessible to residents of both Pennsylvania and Delaware.

suant to this statute, a prospective public works contractor is required to formulate and submit for approval to the New Jersey Department of the Treasury "his or its affirmative action program whereby he or it guarantees minorities employment in all employment categories* * *." N. J. S. A. 10:5-34. No public works contract can be awarded by the state, county, municipality or other political subdivision nor any monies paid thereunder to any prospective contractor "who has not agreed and guaranteed to afford equal opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." N. J. S. A. 10:5-32.

As an alternative to State approval of all affirmative action plans submitted by prospective public works contractors, the statute authorizes state and local agencies to devise their own particular affirmative action programs and submit them for approval by the State Treasurer. N. J. S. A. 10:5-36(c). The New Jersey Department of the Treasury established by regulation a procedure whereby any municipality or public agency may have its affirmative action construction programs so approved. N. J. A. C. 17:27-6.5. State approval of such programs supersedes the otherwise applicable statutory requirements with respect to the submission of affirmative action plans by prospective contractors on all public works contracts.[8] Thus, prospective contractors for public works contracts from a public agency with a state-approved affirmative action construction program need not have their own individual affirmative action programs approved by the State Treasurer on a contract-by-contract basis, and need only

8. Thus N. J. A .C. 17:27-6.5(a) provides that "an approved public agency program" shall exclusively establish the state affirmative action procedures and requirements which implement P. L. 1975, C. 127 * * * as applied to construction contracts and subcontractors involving said public agency."

comply with the requirements of the public agency's state-approved program.[9]

On July 24, 1980, the City of Camden, New Jersey adopted "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf of the City of Camden,"[10] and an amended ordinance was enacted on August 28, 1980.[11] The stated purpose of these ordinances was to relieve unemployment, particularly among minority residents in the City,[12] and the ordinances were designed to permit Camden to substitute its affirmative action program for the state mandate normally imposed on individual public works contractors.

The Camden ordinances provide in pertinent part, that "any party performing or offering to perform a con-

9. In determining whether or not a public agency's affirmative action program will be approved, the State Treasury Department is guided by N. J. A. C. 17:27-6.5(b), which sets forth the minimum requirements for state approval. (App. 62). These criteria are a requirement that the public agency's construction contracts include certain mandatory contract language, a requirement that the public agency's bid advertisements state that bidders must comply with the affirmative action statute, and a requirement that the public agency's minority employment percentage goal not be less than that set by the Treasury Department in N. J. A. C. 17:27-7.3 for the county in which the construction project is located. There is nothing in the state statute or regulations promulgated by the State Treasurer which provides for employment preference by private contractors based upon residency.

10. App. 36-53. Initially passed on July 24, 1980, the ordinance was not formally adopted by the City Council until its second reading on August 28, 1980.

11. App. 54-58. Similarly, the amended ordinance passed on August 28, 1980, was not formally adopted by the Council until its second reading on September 11, 1980.

12. App. 36-37.

tract for public construction in the City of Camden" (Article I, § 1, Definitions of "Developer/Contractor")[13] "in hiring for jobs, shall make every effort to employ persons residing in the City of Camden but, in no event, shall less than forty per cent (40%) of the entire labor force be residents of the City of Camden" (Amended Article IV, § b).[14] The ordinance applies "[W]herever the City of Camden spends funds derived *from any public source* for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00 . . ."[15] (emphasis added). The term "resident of the City of Camden" is defined as follows:

> * * * any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile [sic] of the City of Camden expressing an intention to make this City his permanent place of residence. [Article I, § 5].[16]

Taken together, these provisions dictate that private contractors, as a condition of doing business with the City of Camden, make their employment decisions *solely* on

13. App. 37.

14. App. 56.

15. App. 54-55. As written, the ordinance appears to apply to many more projects than merely public works construction projects. Indeed, the ordinance states that "[t]he provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more."

16. App. 38.

the basis of an applicant's place and duration of residency, regardless of the individual's qualifications or unemployment status. The ordinance compels private developers and construction contractors to have no less than 40% of their workforce on any particular city construction project consist of people who have lived in Camden for at least one year and have expressed an intention to make the City their permanent place of residence. Thus, job preference must be afforded a Camden resident over an out-of-state resident, regardless of whether the latter is unemployed, is a member of a minority group, or possesses more skills for the requisite job. Similarly, a long-term Camden resident is preferred over a new arrival, solely on the basis of length of residence within the municipality. The ordinance applies to the expenditure of funds for construction projects from any public source, which includes both federal and state dollars, as well as revenue generated by Camden taxpayers.

Subsequent to its passage, the City submitted its ordinance to the Chief Affirmative Actions Officer of the New Jersey Treasury Department for approval.[17] On November 24, 1980 the Chief Affirmative Action Officer, acting pursuant to N. J. S. A. 10:5-32 and 36(c) and N. J. A. C. 17:27-6.5, approved the Camden ordinances and designated the Affirmative Action Program of the City of Camden as a state approved affirmative action construction program.[18] As a result of this approval, all prospective private contractors engaged in City construction projects are required to comply with Camden's resident preference requirements.

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17. App. 59.

18. App. 60. Other than the exchange of correspondence and the submission of the ordinance, there were no other administrative proceedings prior to the approval of the ordinance. The appellant did not participate in any fashion in this administrative process, nor was it or any other party afforded an opportunity to do so.

The Council filed a timely notice of appeal with the New Jersey Superior Court, Appellate Division, challenging the validity of the action taken by the Chief Affirmative Action Officer and the constitutionality of the Camden ordinance.[19] On June 19, 1981, the New Jersey Supreme Court accepted this appeal by direct certification pursuant to New Jersey Court Rule 2:12-1, and subsequently upheld the constitutionality of the Camden resident preference against attack on federal constitutional grounds.

Although the Court recognized that the Camden ordinance involved "the imposition of hiring quotas upon private contractors", whereas previous decisions in the area have applied solely to municipal employees, the Court did not believe that this distinction deprived the ordinance of its constitutional validity, either under the Privileges and Immunities Clause, Commerce Clause or Equal Protection Clause of the United States Constitution.[20]

MEANING OF THE DECISION BELOW

In interpreting the holding of this Court that the purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States so far as the advantages resulting from citizenship in those States are concerned," *Hicklin v. Orbeck*, 437 U. S. 518, 524 (1978), the New Jersey Supreme Court concluded that the Clause may not be invoked to strike down purely local ordinances that discriminate on the basis of municipal, rather than state residency.[21] The Court reasoned that since the local ordi-

19. The Appellant in this appeal is solely concerned with the constitutionality of the Camden resident preference ordinance and is not raising any challenges as to the administrative process or to the authority of the State to approve this ordinance.

20. App. 21.

21. App. 26.

nance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents," [22] the resident preference cannot be said to be aimed primarily at out-of-state residents and thus does not violate any privilege of state citizenship.

In so holding, the New Jersey Supreme Court has redefined the Privileges and Immunities Clause to apply solely to actions of a state itself and immunizes discriminatory treatment of out-of-state residents, so long as some in-state residents also suffer adverse consequences.[23] The lower court ignored the fact that merely because the Camden resident preference ordinance may also affect other New Jersey residents, this in itself does not mitigate the burden imposed on out-of-state residents, nor does it minimize the benefits reaped by Camden residents at the expense of nonresidents.

The Court also held that the Camden ordinance was not invalid under the Commerce Clause.[24] The Court recognized that the Supreme Court of the United States has often invoked the Commerce Clause to "strike down

22. There was no evidence in the record nor did the New Jersey Supreme Court point to any to justify its determination that the Camden residency requirement affects more New Jersey residents not living in Camden than it does out-of-state residents.

23. The New Jersey Supreme Court acknowledged that New Jersey's mandatory preference for State citizens in public works contracts, N. J. S. A. 34:9-2, was held violative of the Privileges and Immunities Clause in *Neshaminy Constructors, Inc. v. Krause*, 181 N. J. Super. 367, 437 A. 2d 733 (Ch. Div. 1981), but failed to recognize the implication of that holding in light of its decision in the case *sub judice*. App. 26. Thus, as the law now stands in New Jersey, the State of New Jersey violates the Privileges and Immunities Clause by requiring private contractors to hire State residents on public works construction projects, but it is permissible for a political subdivision of the State of New Jersey, a municipality, to establish a local residency requirement.

24. App. 22-25.

state legislation that unreasonably impedes the flow of commerce across state lines,"[25] or applied the clause "to municipal enactments that unreasonably burdened interstate commerce."[26] However, the Court held that all of the leading Commerce Clause cases involved "state taxes and regulatory measures impeding *private* trade in the national marketplace," whereas in the case *sub judice*, "the City of Camden is not regulating the flow of commerce between private parties . . . [but] acting in the role of market participant."[27] As such, the City's conduct was held immune from Commerce Clause scrutiny. The court felt that in enacting its resident preference ordinance, the City was merely deciding to favor its own citizens and choosing the parties with whom it will deal, conduct which both that court,[28] and this Court, have upheld.[29]

However, the court overlooked the fact that in conditioning the awarding of public works contracts upon the hiring of Camden residents by private contractors, the City was not only deciding with whom it would deal, but dictating, pursuant to a scheme of state regulation, the hiring decisions of private employers. Thus, the City was using the public fisc to regulate the private market.

The Court recognized the recent decision of the Supreme Judicial Court of Massachusetts invalidating resident hiring quotas for private contractors engaged in Boston public works projects. *Mass. Council of Construction Employers, Inc. v. Mayor of Boston*, — Mass. —, 425 N. E. 2d 346 (1981), *cert. granted sub nom. White v. Mass. Council of Construction Employees*, — U. S. —,

25. *See, e.g., Toomer v. Witsell*, 334 U. S. 385 (1948).

26. *Dean Milk Co. v. City of Madison*, 340 U. S. 349 (1951).

27. App. 22.

28. *See K. S. B. Tech. Sales Corp. v. North Jersey District Water Supply*, 75 N. J. 272, 381 A. 2d 774 (1977).

29. *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980).

102 S. Ct. 1273 (No. 81-1003, 1982). However, the New Jersey court distinguished the holding of *Mass. Council of Construction Employers, supra,* on the grounds that the Massachusetts court relied almost exclusively on *Hicklin v. Orbeck, supra,* in which the state was acting as a market regulator, whereas Camden in enacting its resident hiring quota herein, was acting as a market participant.[30]

Nor did the New Jersey Supreme Court find the Camden ordinance to be violative of the Equal Protection Clause.[31] Recognizing that residency requirements for municipal employees have "almost universally been upheld under the Equal Protection Clause as a rational means of furthering the city's public welfare",[32] the Court concluded that a resident hiring preference does not violate any fundamental right to interstate travel and is rationally related to furthering the city's interests. In so holding, the New Jersey Supreme Court completely ignored that while the courts have sustained *continuing* residency requirements for municipal employees, statutes involving a *durational* residency requirements have been consistently struck down. None of the cases cited by the lower court are applicable to the Camden ordinance, which mandates job preferences in the private construction industry based on length of residence within the City.

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30. App. 24-25.

31. App. 27-28.

32. *E.g., McCarthy v. Philadelphia Civil Service Comm'n,* 424 U. S. 645 (1976) (per curiam).

THE FEDERAL QUESTION SUBMITTED IS SUBSTANTIAL

I. The Camden Resident Hiring Quota Violates the Privileges and Immunities Clause.

A. A Local Ordinance Which Discriminates Against Out-of-State Residents Is Not Immune From Review Under the Privileges and Immunities Clause Merely Because It Is Enacted by a Municipality Rather Than the State, or Because It Burdens Some In-State as Well as All Out-of-State Residents.

In holding that the Privileges and Immunities Clause of Article IV, § 2, Cl. 1 of the United States Constitution is inapplicable to the Camden resident preference quota, the New Jersey Supreme Court reasoned that since the municipal ordinance "almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents . . . it does not violate any privilege of state citizenship", and is therefore immune from constitutional review under the Privileges and Immunities Clause.[33] Such a holding undermines the vision and purpose behind the Privileges and Immunities Clause, destroys the Clause's significance, and would result in economic Balkanization and parochial retaliation becoming the predictable order of the day, as the political subdivisions of the several States eagerly seek to accomplish the discrimination forbidden to the States themselves.

The Privileges and Immunities Clause "establishes a norm of comity," *Austin v. New Hampshire*, 420 U. S. 656, 660 (1975), "that is to prevail among the States with respect to their treatment of each other's residents."

33. App. 26.

Hicklin v. Orbeck, supra, 437 U. S. at 523-24.[34] The purpose of the Clause, as described in *Paul v. Virginia,* 75 U. S. (8 Wall.) 168, 180 (1869) is

> to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.

The Clause was designed both to place some constraints on states' freedom to discriminate against nonresidents as well as to foster national unity:

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice was to help fuse into one nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy . . . 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of

34. As this Court stressed in *Hicklin v. Orbeck, supra,* 437 U. S. at 524, n. 8: "[a]lthough this Court has not always equated state residency with state citizenship . . . it is now established that the terms 'citizen' and 'resident' are 'essentially interchangeable . . .' for purposes of analysis of most cases under the Privileges and Immunities Clause of Act IV, § 2." (citations omitted).

> those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' (citation omitted).

Toomer v. Witsell, supra, 334 U. S. at 395-96.[35]

35. Although not extensive, the available evidence of the Framers' intent in drafting the Privileges and Immunities Clause indicates that the clause at least was designed to minimize friction among the people of the various states and between the states themselves. G. Stimson, "Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV," 128 UNIV. OF PA. L. REV. 379, 383 (1979). The clause is derived from the fourth article of the Articles of Confederation which provided:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . ."

JOURNALS OF THE CONTINENTAL CONGRESS 214-15 (G. Hunt ed. 1912). Finding that the discrimination at which this clause was aimed was not eradicated during the period of the confederation, "the provision was carried over into the comity article of the constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the clause in fashioning a single nation." *Austin v. State of New Hampshire, supra,* 420 U. S. at 660-61 (citations omitted). Charles Pinckney of South Carolina, the recognized author of the Privileges and Immunities Clause, *Id.*, 420 U. S. at 661, n. 6, assured the Constitutional Convention that the clause is "formed exactly upon the principles of the 4th article of the present confederation . . ." 3 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 112 (1911). Moreover, Alexander Hamilton stressed that the Privileges and Immunities Clause "may be esteemed the basis of the Union." THE FEDERALIST No. 80, at 497 (H. Lodge ed. 1888).

In protecting both individual rights to non-discriminatory treatment and promoting the structural balance essential to the concept of federalism, the Privileges and Immunities Clause makes nonresidence an improper basis for imposing a special burden. *Austin v. New Hampshire, supra,* 420 U. S. at 662. Thus, this Court has consistently struck down state statutes as violative of the Privileges and Immunities Clause which place unreasonable burdens on out-of-state citizens and whose sole basis for classification is place of residency. *See e.g., Ward v. Maryland,* 79 U. S. (12 Wall.) 418 (1871) (Maryland statute regulating sale of goods in City of Baltimore violated the Privileges and Immunities Clause by requiring nonresident merchants to obtain licenses to practice their trade without requiring the same of similarly situated Maryland merchants, charging nonresidents higher license fees than Maryland merchants, and prohibiting merchants from using nonresident salesmen, other than their regular employees, to sell their goods in the City); *Toomer v. Witsell, supra* (invalidating a South Carolina statute that required nonresidents to pay a fee 100 times greater than that paid by residents for a license to shrimp commercially); *Mullaney v. Anderson,* 342 U. S. 415 (1952) (striking down a plan employed by the Territory of Alaska for the licensing of commercial fisherman which charged non-residents ten times more for licenses than residents); *Doe v. Bolton,* 410 U. S. 179 (1973) (holding that a state criminal abortion statute which prohibits all abortions, except those performed on bona fide state residents, violates the Privileges and Immunities Clause by denying medical services to out of state residents); *Austin v. New Hampshire, supra* (State commuter income tax falling exclusively on incomes of non-residents and not offset by other taxes imposed on residents alone held violative of Privileges and Immunities Clause); *Hicklin v. Orbeck, supra* (Alaskan statute which required that all contracts in connection with the con-

struction of Alaskan oil and gas pipelines contain a provision requiring the employment of qualified Alaskan residents in preference to non-residents held violative of the Privileges and Immunities Clause in that it unreasonably discriminated against citizens of other states).

Although the contours of the Privileges and Immunities Clause are not well developed, *Baldwin v. Fish and Game Commission of Montana*, 436 U. S. 371, 380 (1978), and this Court has yet to determine the full range of activities subject to review, *Id.* at 388, it is now beyond dispute that Article IV, § 2 plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation. *Ward v. Maryland, supra.* Indeed, this Court has consistently recognized that the right to engage in "common callings." *Toomer v. Witsell, supra*, 334 U. S. at 403, and to pursue "ordinary livelihoods" *Id.* at 408 (Frankfurter, J. concurring) is worthy of the safeguards of the Privileges and Immunities Clause, and state and federal courts have regularly struck down laws which interfere with an individual's right to engage in his chosen occupation solely because of residency.[36]

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36. Thus, laws have been struck down which interfere with an out-of-state resident's right to engage in commercial fishing, *see e.g., Toomer v. Witsell, supra, Mullaney v. Anderson, supra, Brown v. Anderson*, 202 F. Supp. 96 (D. Alaska 1962), *Gospodonovich v. Clements*, 108 F. Supp. 234 (E. D. La. 1951), *app. dismissed*, 344 U. S. 911 (1953); *Edwards v. Leaver*, 102 F. Supp. 698 (D. R. I. 1952); marketing of produce, *Ward v. Maryland, supra;* employment on oil and gas pipelines, *Hicklin v. Orbeck, supra;* ferry boat engineer officer, *District No. 1 Pacific Coast District, M. E. B. A. v. Ward*, 505 F. Supp. 98 (W. D. Wash. 1981) and public works construction, *Salla v. County of Monroe*, 48 N. Y. 2d 514, 399 N. E. 2d 909, 423 N. Y. S. 2d 878 (1979), *cert. denied sub nom. Abrams v. Salla*, 446 U. S. 909 (1980); *Neshaminy Constructors, Inc. v. Krause, supra.* Indeed, since this

In the case *sub judice*, the City of Camden is seeking to condition employment with private contractors engaged in public works construction projects upon location and length of residency. Under the terms of the ordinance, out-of-state residents will be absolutely barred from at least 40% of the employment opportunities on public construction projects in the City. Surely, access to private employment is the kind of "privilege" and "immunity" which "bear[s] upon the vitality of the Nation as a single entity . . ." and the distinction imposed by the City is of kind which hinders "the formation, the purpose, or the development of a single Union . . ." *Baldwin v. Fish and Game Commission of Montana, supra*, 436 U. S. at 383, warranting careful scrutiny under the Privileges and Immunities Clause.

It is well established that what would be unconstitutional if done directly by the State can no more readily

36. (Cont'd.)

court's holding in *Hicklin v. Orbeck*, the Privileges and Immunities Clause has been employed successfully to strike down residency requirements that discriminate against out-of-state applicants for admission to the bar. *See e.g., Stalland v. South Dakota Board of Bar Examiners*, 530 F. Supp. 155 (D. S. D. 1982) (requirement that applicant for admission to practice law in South Dakota must be State resident violates Privileges and Immunities Clause); *Strauss v. Alabama State Bar*, 520 F. Supp. 173 (N. D. Ala. 1981) (Alabama rule requiring applica[redacted]be bona fide resident at the time of certification to sit for the bar examination contravenes Privileges and Immunities Clause); *Sheley v. Alaska Bar Association*, 620 P. 2d 640 (Alaska 1980) (invalidates rule which requires applicants to establish domicile in Alaska at least 30 days before the bar examination); *Gordon v. Committee on Character and Fitness*, 48 N. Y. 2d 266, 397 N. E. 2d 1309, 422 N. Y. S. 2d 641 (197[illegible]) (strikes down New York rule as violative of the Privileges and Immunities Clause which requires proof of state residency for at least six months prior to submission of application for admission to the bar).

be accomplished by a political subdivision at the State's direction. *See, Memorial Hospital v. Maricopa County*, 415 U. S. 250, 256 (1974). Indeed, a municipality is a creature of the state legislature and has no greater powers than those exercised by the state:

> [M]unicipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will.

The City of Trenton v. New Jersey, 262 U. S. 182, 187 (1923).[37] Recently, courts both in New Jersey and elsewhere have struck down as violative of the Privileges and Immunities Clause state statutes which granted an ab-

37. *Cf., Borough of Sayre v. Phillips*, 148 Pa. St. 482, 24 Atl. 76 (1892), where in striking down an ordinance which exempts borough residents from its peddling licensing requirements, the Pennsylvania Supreme Court stressed:

> "When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a corporate character . . . It can have no better right to adopt discriminating trade regulations than the state has."

The New Jersey Supreme Court has consistently recognized the limited nature of the power of the State's municipalities. *See e.g., Dome Realty, Inc. v. City of Paterson*, 83 N. J. 212, 225, 416 A. 2d 334, 341 (1980); *Ringlieb v. Parsippany-Troy Hills Tp.*, 59 N. J. 348, 283 A. 2d 97 (1971); *Moyant v. Borough of Paramus*, 30 N. J. 528, 535, 154 A. 2d 9, 12 (1959).

solute job preference to state residents on all public works construction projects.[38] Thus, the New Jersey Supreme Court's ruling in the case *sub judice* permits Camden to engage in the very type of discriminatory activity which is proscribed for the State.[39]

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38. *See Neshaminy Constructors, Inc. v. Krause, supra; Salla v. County of Monroe, supra; Mass. Council of Construction Employers v. Mayor of Boston, supra.* In *Mass. Council of Construction Employers*, Massachusetts has not appealed that portion of the opinion which invalidated the state public works construction resident preference. *But see, People Ex Rel. Holland v. Bleigh Construction Co.*, 61 Ill. 2d 258, 335 N. E. 2d 469 (1975) where the Illinois Supreme Court held that a one year state residency requirement for preference on public works construction projects violates the Equal Protection Clause, but a mere preference for Illinois residents is not violative of the Privileges and Immunities Clause. The case was decided prior to this Court's holding in *Hicklin v. Orbeck, supra*, and its continuing validity is open to question.

39. Ironically, N. J. S. A. 34:9-2, the State resident preference statute struck down in *Neshaminy Constructors, Inc. v. Krause, supra*, applies to the construction of any public work for the state, municipality or any subdivision thereof. Thus, the statute reads in pertinent part:

> "In the construction of any public work for the state, or any county, city, town, township or borough, or other municipal corporation or any board, committee, commission or officer thereof, whether the same be a building, excavation, sewer, or drainage construction, road building, paving, bridge, or any other form or kind of public work, preference in employment thereon shall be given to citizens of the state of New Jersey who have resided and maintained domiciles within the state for a period of not less than one year immediately prior to such employment . . ."

Although the New Jersey Supreme Court acknowledges the holding of *Neshaminy* (App. 26, n. 8), there is no indication that its holding is being overturned *sub silentio*. Thus, as the law now

By construing the Privileges and Immunities Clause to have so narrow a reach as to apply only to action taken directly by a State itself, the New Jersey Supreme Court has enacted a loophole so large that it will swallow up the entire Clause. Under the lower court's interpretation, a state may circumvent the sanctions of the Privileges and Immunities Clause merely by directing each locality to undertake the very kind of discriminatory conduct which the State itself is prohibited from engaging in directly.

We have not located a single authority which has held a local ordinance immune from review under the Privileges and Immunities Clause merely because the regulations disadvantaged *some* in-state residents as well as *all* out-of-state residents. On the contrary, the Privileges and Immunities Clause has invalidated local ordinances, regardless of the fact that such ordinances may have also burdened other in-state residents.[40] Thus, almost a cen-

39. (Cont'd.)

exists in New Jersey, it is unlawful for a municipality to require private contractors to prefer New Jersey residents but permissible for it to require contractors to prefer municipal residents.

40. *See e.g., Ward v. Maryland, supra; Ward Baking Co. v. City of Fernandina*, 29 F. 2d 789 (S. D. Fla. 1928) (ordinance fixing higher license tax to be paid by nonresident bakeries delivering within the city than for resident bakeries violates both the Privileges and Immunities Clause and the Fourteenth Amendment); *State v. Mercer*, 132 Md. 263, 103 Atl. 570 (1918) (held that ordinance imposing higher licensing fees on non-county residents is invalid under the Privileges and Immunity Clause and the Fourteenth Amendment); *State v. Nolan*, 108 Minn. 170, 122 N. W. 255 (1909) (city ordinance regulating hawkers and peddlers within the municipality, excluding bona fide local residents from its provisions, deprives non-residents of both equal protection of the law and of a privilege and immunity enjoyed by the resident citizen); *Commonwealth v. Snyder*, 182 Pa. St. 630, 38 Atl. 358 (1897) (license fee which exempts peddlers residing in the county violates the constitution); *Graffty v. City of Rushville*, 107 Ind. 502, 8 N. E. 609 (1886) (license ordinance which applied only

tury ago, the Kentucky Supreme Court, in striking down a municipal ordinance which imposed a higher licensing tax on non-city residents, rejected the argument that a local ordinance is valid if it burdens some state residents as well:

> The ordinance under which this payment was exacted applies to the resident of the State as well as the non-resident, and no one having his place of business outside of the city limits is allowed to sell by sample unless he pays the license imposed, and the fact that its provisions apply to the resident of the State as well as the non-resident, does not add to the validity of the act, or give strength to the argument in support of it.

Fecheimer v. City of Louisville, 84 Ky. 306, 309, 2 S. W. 65, 66 (1886).

Moreover, in an analogous situation under the Commerce Clause, this Court held in *Dean Milk Co. v. City of Madison, supra*, 340 U. S. at 354, n. 4, that it is "immaterial" that the Madison ordinance subjected some intra-state concerns to the same discriminatory treatment as firms from out of state.[41] The critical element in finding

40. (Cont'd.)

to peddlers who are non-city residents and to goods manufactured outside of the county violates the Privileges and Immunities Clause); *cf., Construction and General Laborers Union Local 563 v. City of Saint Paul*, 270 Minn. 427, 134 N. W. 2d 26 (1965) (local ordinance which compels all contractors who perform work for the municipality to employ only county residents is held to be unconstitutional).

41. *Cf., Brimmer v. Rebman*, 138 U. S. 78, 82-3 (1891); *Minnesota v. Barber*, 136 U. S. 313, 328 (1890) ("A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.").

impermissible discrimination in *Dean Milk* and in the case at bar is that in both instances there are out-of-state residents who are subjected to discrimination, by being denied access to a local market, and selected local concerns that are the beneficiaries of this discrimination. It is of little consequence to *all* of the non-New Jersey residents who are denied access to a significant portion of the public works employment opportunities in the City of Camden, that some New Jersey residents are also burdened. To allow a state or municipality to immunize discriminatory conduct merely because the law or ordinance disadvantages some local residents would render the Privileges and Immunities Clause a meaningless enactment.

Permitting Camden to penalize out-of-state residents merely invites retaliation, which was one of the very evils which the adoption of the Constitution was designed to eliminate. *Austin v. State of New Hampshire, supra,* 420 U. S. at 667. Rather than encouraging economic welfare, the Camden resident hiring quota will merely foster internecine economic warfare, resulting in the kind of Balkanization and conflict among the states which the Privileges and Immunities Clause sought to heal. Where a classification, such as that herein, utilizes residency as the sole ground to deny all out-of-state citizens access to private employment, such a legislative distinction must be carefully scrutinized under the Privilege and Immunities Clause, and is not exempt from constitutional review merely because some in-state residents are also disadvantaged.

B. The Camden Ordinance Is Invalid, as There Is no Proof That Non-Residents Constitute a "Peculiar Source of the Evil" at Which the Ordinance Is Aimed, and That the Discrimination Practiced Bears a Substantial Relationship to the Particular "Evil" That the Non-Residents Are Said to Present.

It is beyond dispute that the Privileges and Immunities Clause is not absolute, and certainly "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer v. Witsell, supra*, 334 U. S. at 396. Rather, it bars discrimination against citizens of other states only "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* Under the two-pronged test established in *Toomer v. Witsell, supra*, a "substantial reason for the dicrimination" would not exist ". . . unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed," *Id.*, at 398, and there is a "reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them." *Id.* at 399.

Following the standards established in *Toomer*, this Court recently held in *Hicklin v. Orbeck, supra*, that a resident preference requirement imposed by state law on private contractors engaged in construction work related to Alaska's oil and gas leases which was designed to alleviate high unemployment, violated the Privileges and Immunities Clause. This Court observed that even if "a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents"—a proposition

considered "dubious", *Id.*, 437 U. S. at 526, the Alaska hire law was still constitutionally invalid. The Court stressed that there was no showing that nonresidents were "a peculiar source of the evil" of high unemployment that the statute was enacted to remedy:

> What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents . . . were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities . . .

Id., at 526-27. Moreover, the Court reasoned that even if the State had demonstrated that nonresidents were a "peculiar source of the evil," the statute still violated the second prong of the *Toomer* test, since the discrimination effected by the statute against nonresidents did not bear a substantial relationship to the particular "evil" they were said to represent:

> Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job training program.
>
> . . . .
>
> Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska

> Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not.

Id., at 527-28.[42]

The analogy to the case at bar is compelling. Although the stated purpose of the Camden ordinance is to reduce unemployment, the City has offered no evidence that nonresidents are a peculiar source of unemployment within the municipality.[43] Moreover, the ordinance, in barring nonresidents from construction jobs in Camden will simply result in exporting the problem of unemployment, a solution heretofore not permitted by the Federal

42. Following this rational, courts in New Jersey in *Neshaminy Constructors, Inc. v. Krause*, New York in *Salla v. County of Monroe, supra* and Massachusetts in *Mass. Council of Construction Employers, Inc. v. Mayor of Boston, supra*, have struck down state statutes which granted an absolute job preference to state residents on all public works construction projects. Like the State of Alaska in *Hicklin*, the State of New York sought to justify its resident preference as necessary to relieve unemployment. In finding this purpose insufficient, the New York Court of Appeals emphasized:

> "Granted that the counteracting of unemployment is a legitimate State concern, the relevant criteria for all privileges and immunities analysis still are whether non-residents are a 'peculiar source' of the evil of joblessness in New York and whether the statute is fashioned with sufficient precision to meet the problem without unduly impinging on the rights of those who do not contribute to it. In the end, nothing less than a unique link between the interest served and the discrimination practiced will do." *Salla v. County of Monroe, supra*, 48 N. Y. 2d at 523, 399 N. E. 2d at 913-14, 423 N. Y. S. 2d at 882.

43. While it is certainly true that any job performed by a nonresident is not performed by a Camden resident, this argument was rejected as "simplistic" by the New York Court of Appeals when it was raised as a justification for the New York resident preference law. *Salla v. County of Monroe, supra*, 48 N. Y. 2d at 523, 399 N. E. 2d at 914, 423 N. Y. S. 2d at 882.

Constitution. *Edwards v. California,* 314 U. S. 160 (1941).

Nor is there the "reasonable" or "substantial" relationship between the discrimination practiced and the interest served by the ordinance as required by *Hicklin v. Orbeck, supra,* 437 U. S. at 526, 527. The ordinance does not draw its preference in terms of "unemployed residents", but only in terms of Camden residents, offering an across-the-board preference to all City residents, employed or unemployed, rich and poor. As such, Camden can offer no substantial reason for the onerous burden placed on out-of-state residents "beyond the mere fact that they are citizens of other States." *Toomer v. Witsell, supra,* 334 U. S. at 396.

Unemployment is a blight on the national landscape which knows no political or geographic boundary.[44] While

44. Thus, while the stated purpose of the Camden resident preference ordinance was to reduce unemployment, according to the United States Bureau of Labor Statistics, unemployment in the City of Philadelphia in 1980 was 12.4%, black unemployment 20.9%, and black male unemployment 22.5%. The problem of black youth unemployment was even more distressing. According to a recent report of the Urban League of Philadelphia,

> "[n]owhere in the United States—with the possible exception of Detroit—has the problem of minority youth unemployment reached the crisis proportions that it has in Philadelphia . . . . In Philadelphia, the [official] unemployment rate among [minority] 16 to 19 years old was 32.1 percent—a rate topped only by Detroit where 39.8 percent of those in that age group were unemployed. The national teenage unemployment rate is just under 18 percent . . . . According to the National Urban League's calculations, the black unemployment in an area is generally about twice that of the official rate for the population as a whole. Called the Hidden Unemployment Index, this formula counts discouraged workers no longer looking for work as well as those working part-time who are actually seeking full-time jobs. Under this index, the black youth unemployment rate in Philadelphia was probably more than

local governments may suffer heavy financial burdens, unemployment is a common concern of all the states in the Union. A City may not simply construct a self-enclosed "Berlin Wall" in an effort to export unemployment or to solve its problems at the expense of citizens of neighboring states. To uphold the constitutionality of the Camden resident preference ordinance would significantly compromise the underlying vision of the Privileges and Immunities Clause and encourage the division and divisiveness which the Clause was designed to dispel.

II. The Camden Resident Hiring Quota Violates the Commerce Clause.

A. The Camden Ordinance Is Not Immune From Review Under the Commerce Clause, Since the City Is Not Acting as a Market Participant, But Seeking to Use Its Control Over Public Works Construction Projects to Regulate Employment in the Private Market.

It is well settled that although the Commerce Clause grants to Congress the power "[t]o regulate commerce among the several states," this "Court has long recognized that it also limits the power of the states to erect barriers against interstate trade." *See e.g., Lewis v. BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980); *Hughes v. Oklahoma*, 441 U. S. 322, 326 (1979); *Philadelphia v. New Jersey*, 437 U. S. 617, 623 (1978). Indeed, "[t]he very purpose of the Commerce Clause was to create an area of

44. (Cont'd.)

60 percent in 1980 and is still rising. At a minimum, at least four out of every 10 non-white teenagers who wanted to work was jobless in 1980."

W. Johnson, "The Dilemma of Youth Unemployment," *The State of Black Philadelphia 1982*, at 73, 75 (Urban League of Philadelphia, 1982).

free trade among the several states." *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 330 (1944). The Commerce Clause crystallizes the necessity of centralized regulation among the states so ". . . every consumer may look to the free competition from every producing area in the nation to protect him from exploitation by any." *See H. P. Hood & Sons, Inc. v. DuMond*, 336 U. S. 525, 539 (1949). The guiding principle that ". . . the State may not promote its own economic advantages by curtailment or burdening of interestate commerce . . ." is one ". . . deeply rooted in both our history and our law." *Id.*, at 532-33. Thus, this Court has consistently held that the Commerce Clause "precludes a State from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire*, — U. S. —, 102 S. Ct. 1096, 1100 (1982). *See, e.g., Hughes v. Oklahoma, supra* (statute prohibiting transport or shipment outside of state of minnows seized or procured within state waters); *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1 (1928) (statute requiring shrimp processing to be done in-state); *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923) (legislation requiring gas extracted in-state to be supplied to state residents before export).

The Camden ordinance seeks to alleviate local unemployment by barring out-of-state residents from competing for at least 40 per cent of the jobs offered by private contractors engaged in public works construction projects for the City. As such, this ordinance fosters the evils of economic protectionism and isolationism which have long been condemned under the broad purposes of the Commerce Clause:

> This principle that our economic unit is the Nation which alone has the gamut of powers necessary to

> control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 527, 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.

H. P. Hood & Sons v. DuMond, supra, 336 U. S. at 537-38.

The New Jersey Supreme Court, while recognizing that this Court has often invoked the Commerce Clause to strike down legislation that unreasonably impedes the flow of commerce across state lines, held that the Camden ordinance is immune from scrutiny under the Commerce Clause, since the City is acting in the role of market participant, not market regulator. (App. 22). Relying upon this Court's holdings in *Hughes v. Alexandria Scrap, Inc.*, 426 U. S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U. S. 429 (1980), the court stressed that the City is "not regulating the flow of commerce between private parties . . ." (App. 22) but, as a market participant, is merely "favor-[ing] its own citizens and choos[ing] the parties with whom it will deal." (App. 23-4).

In so holding, the lower court has completely misconstrued the nature of the City's conduct. In the instant case, Camden is not acting as a market participant, but as a regulator of the employment relationship between private contractors and their employees. While arguably a requirement that all public works contracts be performed by Camden based companies might involve the City as a market participant, *see American Yearbook Company v. Askew*, 339 F. Supp. 719 (M. D. Fla.), *aff'd mem.*, 409

U. S. 904 (1972), in the case *sub judice*, the City is seeking to use the carrot of public construction contracts to control the hiring decisions of private employers. Here, the City of Camden is regulating both the primary relationship between the City and its public works construction contractors, as well as the secondary relationship between these contractors and their employees. The City's interest in the employment decisions of private contractors is far too attenuated to permit its conduct to escape scrutiny under the Commerce Clause.

Moreover, this is not a matter where the City freely on its own has decided to participate in the market and exercise its right to favor its own citizens over others. *Hughes v. Alexandria Scrap, supra*, 426 U. S. at 810. Rather, the Camden ordinance was adopted in response to a regulatory scheme passed by the New Jersey Legislature, and became operative *only upon* approval by the Chief Affirmative Action Officer of the State Treasury. Absent such approval, Camden would have been unable to compel private contractors to hire local residents. In addition, this is not simply a matter of a municipality using city funds to serve local citizens. *Reeves, Inc. v. Stake, supra*, 447 U. S. at 442. Rather, the ordinance applies whenever the City spends revenues for construction projects from *any public source*, with the vast bulk of the funding for such projects derived from state and federal grants. Thus, the City is only able to participate in the market place to the extent that its conduct has been authorized by the State, and its funding generated by other political entities.

Nor are the holdings of *Hughes v. Alexandria Scrap Corp., supra*, or *Reeves, Inc. v. Stake, supra*, applicable to the case at bar. In upholding the more stringent vehicle documentation requirements for out-of-state processors in *Alexandria Scrap Corp.*, this Court stressed that unlike prior cases voiding state laws inhibiting interstate commerce, "Maryland has not sought to prohibit the flow of

hulks, or to regulate the conditions under which it may occur." *Id.*, 426 U. S. at 806. Similarly, in affirming the right of South Dakota to give state buyers an absolute preference in the purchase of cement from a state owned and operated cement plant in *Reeves*, this Court emphasized that South Dakota has not erected an absolute bar to interstate commerce, since the State does not prohibit the resale of cement. *Id.*, 447 U. S. at 444, n. 17. But the Camden ordinance achieves that very result, for the City is not merely deciding with whom it will deal, but it is preventing the contractors favored by the City from hiring out-of-state residents. Thus, it is no different than if South Dakota in *Reeves*, had restricted the resale of cement to state residents, and Maryland in *Alexandria Scrap*, had prohibited the flow of hulks, actions which this Court indicates would have been constitutionally infirm.

The lower court's ruling that the Camden resident preference which discriminates against out-of-state residents, is immune from scrutiny under the Commerce Clause stands in stark contrast to this Court's "repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *H. P. Hood & Sons, Inc. v. DuMond*, *supra*, 336 U. S. at 532. While the Commerce Clause may not prohibit a city from participating in the market and favoring its own citizens, *Hughes v. Alexandria Scrap*, *supra*, 426 U. S. at 810, the mere involvement of a governmental unit does not talismanically confer governmental conduct with immunity from Commerce Clause scrutiny. Surely, a Camden ordinance mandating that all developers within the City provide 40 per cent of all their jobs to local residents would be impermissible under the Commerce Clause. Imposing such a restriction upon only a portion of the developer's work—that performed on public works projects—is repugnant to the very same constitutional principles. The mere use of public

funds or participation of the municipality does not automatically exempt the City's actions from constitutional review.[45]

> [T]he Commerce Clause forbids discrimination, whether forthright or ingenious. In each case it is [the court's] duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. (citations omitted).

Best & Co. Inc. v. Maxwell, 311 U. S. 454, 455-56 (1940). Here, Camden is acting not as a market participant but as a mere conduit, and it should not be permitted to use its governmental status to choke off the stream of interstate commerce. To hold otherwise, as did the court below, "would be to eat up the rule under the guise of an exception." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935).

B. The Camden Ordinance Imposes an Impermissible Burden on Interstate Commerce.

Admittedly, "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *The Great Atlantic and Pacific Tea Company, Inc. v. Cottrell*, 424 U. S. 366, 371 (1976). In the absence of conflicting Congressional legislation, "the States retain authority under their general police powers to regulate matters of 'legitimate local concern' even though interstate commerce may be affected." *Lewis v. BT Investment Managers, Inc., supra*, 447 U. S. at 36. However, even when acting to further a "legitimate local concern," each State must act in a manner consistent

45. *See, Smith v. Department of Agriculture of the State of Georgia*, 630 F. 2d 1081 (5th Cir. 1980), *cert. denied*, 452 U. S. 910 (1981) (held a Georgia regulation whereby nonresidents were assigned to inferior sales locations at the State farmers market during crowded conditions is violative of the Commerce Clause).

with the "ultimate . . . principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G. A. F. Seelig, Inc., supra*, 294 U. S. at 527.

> However important the state interest at hand, 'it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.' *Philadelphia v. New Jersey*, 437 U. S. at 626-27

Lewis v. BT Investment Managers, Inc., supra, 447 U. S. at 36.

Although incidental burdens on interstate commerce are upheld when necessary to ensure a state's protection of public health and safety, this Court has stressed that "where simple economic protectionism is effected by state legislation, a virtual *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey, supra*, 437 U. S. at 624. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders. *Id.*

Certainly, the Camden resident hiring quota creates a "patent discrimination against interstate trade." *Id.*[46] The ordinance prohibits out-of-state residents from applying

46. It is beyond dispute that a local ordinance may create an unlawful infringement on interstate commerce. *See, Dean Milk Co. v. City of Madison, supra.* Similarly, the movement of persons falls within the protection of the Commerce Clause. *See e.g., Edwards v. California, supra*, 314 U. S. at 172; *Colgate v. Harvey*, 296 U. S. 404, 444 (1935) (Stone, J., dissenting) ("This Court has many times pointed out that movements of persons across state boundaries are a part of interstate commerce subject to the regulations and entitled to the protection of the national government under the Commerce Clause."); *Service Machine & Shipbuilding Corp. v. Edwards*, 617 F. 2d 70, 73 (5th Cir.), *aff'd. mem.*, 449 U. S. 913 (1980).

for work from private contractors for at least 40 percent and possibly 100 percent of all the positions on any public works job for the City of Camden.[47] This ordinance is particularly burdensome, since many of the affected employees are "steady hands", who work regularly for the same contractor and will have to be laid off every time that contractor accepts a job in Camden. Surely, the "aim" and "effect" of such discrimination is "establishing an economic barrier against competition with the products of another state or the labor of its residents." *Baldwin v. G. A. F. Seelig, Inc., supra*, 294 U. S. at 527.

The danger of this kind of economic parochialism is that it merely encourages "precisely the sort of Balkanization of interstate commercial activity that the Constitution was intended to prevent." *Douglas v. Seacoast Products, Inc.*, 431 U. S. 265, 286 (1977).

> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual states to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects . . . (citation omitted).

Boston Stock Exchange v. State Tax Commission, 429 U. S. 318, 329 (1977). Thus, in invalidating a New York statute placing restrictions upon the in-state sale of milk produced in other states, Mr. Justice Cardozo warned:

> We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual

47. The ordinance mandates that at least 40 percent of the employees hired must be Camden residents. It further specifies that "[t]he developer/contractor, in hiring for jobs, shall make every effort to employ persons residing with the City of Camden . . ." (App. 56), resulting in the real possibility that out-of-state residents may be completely barred from public construction employment opportunities.

> jealousies and other economic retaliation . . .' If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation (citations omitted).

Baldwin v. G. A. F. Seelig, supra, 294 U. S. at 522.

Nor can Camden justify its ordinance on the legitimacy of its objective of alleviating unemployment, as the evil of protectionism can reside in legislative means as well as the legislative purpose. *City of Philadelphia v. New Jersey, supra.* Whatever the validity of Camden's ultimate purpose, it may not be accomplished by placing onerous burdens on interstate commerce, or by seeking to isolate itself from the national economy.

> The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition . . . or to create jobs by keeping industry within the State . . . or to preserve the State's financial resources from depletion by fencing out indigent immigrants . . . In each of these cases, a presumably legitimate goal was sought to be achieved by . . . illegitimate means . . .
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> * * *
>
> . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. (citations omitted)

City of Philadelphia v. State of New Jersey, supra, 437 U. S. at 627-28.

However, even if the Camden resident hiring quota is not found to be protectionist and thus subject to the

"virtually *per se* rule of invalidity," *Philadelphia v. New Jersey, supra,* it still constitutes an impermissible restriction on interstate commerce under the less stringent standard of review, established by this Court in *Pike v. Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). For under this test,

> . . . the burden falls on the State to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake . . . (citations omitted)

Hunt v. Washington State Apple Advertising Commission, 432 U. S. 333, 353 (1977).

In the case at bar, while Camden's efforts at reducing unemployment are worthy, the enacted statute is far too overbroad. By offering an automatic preference to all Camden residents, a highly skilled, educated and employed worker is entitled to the same preference as an unskilled, habitually unemployed worker. Moreover, as this Court stressed in *Hicklin v. Orbeck, supra,* 437 U. S. at 528, certain less discriminatory alternatives to this across-the-board residents' preference, such as "a preference to unemployed residents or to residents enrolled in job training programs" might possibly be constitutional. Such alternatives could have been adopted by Camden, rather than the overly broad, parochial legislation which was enacted.

Certainly, the vitality and health of the nation depend upon the ability of cities and states throughout the country to engage in economic experiments and novel undertakings. But this does not mean that there are no boundaries to the permissible area of such legislative activity.

> There are. And none is more certain than the prohibition against attempts on the part of any single

> State to isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' *Baldwin v. Seelig*, 294 U. S. 511, 523.

Edwards v. California, supra, 314 U. S. at 173-74. In upholding the Camden resident hiring quota, the New Jersey Supreme Court has endorsed parochial isolation and Balkanization to the detriment of the residents in the surrounding states. Yet these were the very evils which the Commerce Clause was designed to eliminate.

III. The Camden Ordinance, by Requiring a Year's Residence in the City as a Condition for Preference for at Least 40 Per Cent of the Jobs Offered by a Private Contractor Engaged in Public Works Construction Projects for the City, Violates the Equal Protection Clause, Since Such a Durational Residency Requirement Creates an Invidious Classification That Impinges on the Fundamental Right of Interstate Travel.

Even if this Court finds that the lower court did not err in holding that the Camden resident hiring quota was constitutional both under the Privileges and Immunities Clause of Article IV, § 2 and the Commerce Clause, the City's ordinance, by imposing a durational residency requirement, impinges on the fundamental constitutional right of interstate travel, and violates the Equal Protection

Clause of the Fourteenth Amendment, absent proof of a compelling state interest. *See e.g., Shapiro v. Thompson*, 394 U. S. 618 (1969); *Dunn v. Blumstein*, 405 U. S. 330 (1972); *Memorial Hospital v. Maricopa County*, 415 U. S. 250 (1974). In upholding the ordinance, the New Jersey Supreme Court completely ignored the distinction that has been drawn in "right to travel" cases between continuing and durational residency requirements, and failed to recognize that the Camden ordinance impermissibly denies access to private employment opportunities based on both place and length of residency.

The right of interstate travel has been repeatedly recognized as a basic constitutional right. *Memorial Hospital v. Maricopa County, supra*, 415 U. S. at 255, n. 7.[48] Although the textual source of this right has been the subject of debate,[49] its fundamental nature has been consistently recognized by this Court. *Jones v. Helms*, 452 U. S. 412, 418 (1981). In *United States v. Guest*, 383 U. S. 745, 757-58 (1966), this Court explained that:

> . . . [t]he Constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has

48. Indeed, this Court recently observed that "[t]he constitutional right of interstate travel is virtually unqualified." *Califano v. Torres*, 435 U. S. 1, 4, n. 6 (1978) (per curiam).

49. Supreme Court decisions have located the source of the right to travel in various constitutional provisions, including the Privileges and Immunities Clause of Article IV, § 2, *Ward v. Maryland, supra*, 79 U. S. (12 Wall) at 430; the Commerce Clause, *Edwards v. California, supra*, 314 U. S. at 177; the Privileges and Immunities Clause of the Fourteenth Amendment, *Id.* at 178 (Douglas, J., concurring); *Id.* at 181-83 (Jackson, J., concurring); *Twining v. New Jersey*, 211 U. S. 78, 79 (1908); and the due process clauses of the fifth and fourteenth amendments, *Williams v. Fears*, 179 U. S. 270, 274 (1900); *Shapiro v. Thompson, supra*, 394 U. S. at 671 (Harlan, J., dissenting).

> been firmly established and repeatedly recognized . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution . . . (citations omitted)

In striking down durational residency requirements, this Court has stressed that such classifications "impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." *Dunn v. Blumstein, supra,* 405 U. S. at 342. In the case at bar, by conditioning access to employment opportunities based on length of residency, the City of Camden is creating two classes of needy resident families indistinguishable from each other except by length of municipal residence. Thus, Camden is forcing a person who wishes to travel and change residences to choose between travel and access to employment opportunities. *See, Dunn v. Blumstein, supra,* 405 U. S. at 342.

"Although any durational residence impinges to some extent on the right to travel," *Memorial Hospital v. Maricopa County, supra,* 415 U. S. at 256, this Court has never declared such a classification to be *per se* unconstitutional. *Id.* Rather, it has stressed that it must "determine whether such requirements penalize citizens for exercising their constitutional right to travel." *Jones v. Helms, supra,* 452 U. S. at 420-21, and if so, such a classification may only be justified by a compelling state interest. *Memorial Hospital v. Maricopa County, supra,* 415 U. S. at 258. Thus, the courts have required a showing of a compelling state interest and struck down durational residency requirements

for welfare benefits,[50] voting,[51] nonemergency medical services, [52] public housing,[53] and veteran benefits.[54] This Court has never considered the question of durational residency requirements for public employment. However, lower courts have overwhelmingly invalidated state [55] and local [56] residence preference requirements for government

50. *Shapiro v. Thompson, supra,* (one year waiting period for welfare benefits).

51. *Dunn v. Blumstein, supra,* (one year state and three month county residency requirements for voting).

52. *Memorial Hospital v. Maricopa County, supra,* (one year residency requirement for county-funded nonemergency medical care).

53. *See, e.g., Cole v. Housing Authority,* 435 F. 2d 807 (1st Cir. 1970) (two year waiting period for subsidized public housing); *King v. New Rochelle Municipal Housing Authority of City of Newport,* 442 F. 2d 646 (2d Cir.), *cert. denied* 404 U. S. 863 (1971) (five year residency requirement for admission to public housing).

54. *See, e.g., Strong v. Collatos,* 593 F. 2d 420 (1st Cir. 1979) (three year residency requirement for receipt of certain veterans' welfare benefits); *Barnes v. Board of Trustees, Michigan Veterans Trust Fund,* 369 F. Supp. 1327 (W. D. Mich. 1973) (five year durational residency requirement to qualify for aid from Veterans Trust Fund).

55. *See, e.g., Nehring v. Ariyoshi,* 443 F. Supp. 228 (D. Hawaii 1977) (one year state residence requirement on applicants for state and local government jobs); *Justice v. Manzagol,* 11 E. P. D. ¶ 10,758 (D. N. M. 1976) (one year residence for all state nonprofessional employees); *State v. Wylie,* 516 P. 2d 142 (Alaska 1973) (personnel rules giving absolute hiring preference to one-year Alaskan residents).

56. *Jenkins v. McCollum,* 446 F. Supp. 667 (N. D. Ala. 1978) (county residency requirement for federally funded county position); *Spradling v. Hutchinson,* 253 S. E. 2d 371 (W. Va. 1979) (requirement that applicant for police officer must have been resident of city where he is applying or of county where city is situated for at least one year any time prior to his application);

employment, private employment on public projects,[57] commercial fishing[58] and veterans preference in public employment.[59] Access to employment opportunities is as much "a basic necessity of life" as nonemergency medical care or welfare assistance, *Memorial Hospital v. Maricopa County, supra*, 415 U. S. at 259, and as such, may only be abridged upon the showing of a compelling state interest.[60]

56. (Cont'd.)

Eggert v. City of Seattle, 81 Wash. 2d 840, 505 P. 2d 801 (1973) (city charter provision favored one-year city or county residents for municipal employment); *Contra, Town of Milton v. Civil Service Commission*, 365 Mass. 368, 312 N. E. 2d 188 (1974) (upheld durational residence preference for local police officers).

57. *People Ex Rel. Holland v. Bleigh Construction Co., supra* (one year durational residence in state for preference for employment on public works projects).

58. *Hassan v. Town of East Hampton*, 500 F. Supp. 1034 (E. D. N. Y. 1980) (one year of town residence required to obtain commercial shellfishing license); *Massey v. Apollonio*, 387 F. Supp. 373 (D. Maine 1974) (statute requiring presence within state for at least 8 months of each year for three successive years to receive lobster fishing license).

59. *Carter v. Gallagher*, 337 F. Supp. 626 (D. Minn. 1971), *aff'd* 452 F. 2d 315 (8th Cir.), *cert. denied*, 406 U. S. 950 (1972) (five year residency requirement for veterans preference); *Stevens v. Campbell*, 332 F. Supp. 102 (D. Mass. 1971) (five year consecutive residence in state for preference in employment in classified civil service).

60. Nor does the fact that there is no fundamental constitutional right to public employment, *see, e.g., Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 313 (1976) compel a contrary conclusion. There is no fundamental right to welfare, *Dandridge v. Williams*, 397 U. S. 471, 483 (1970) but strict scrutiny was still used in *Shapiro v. Thompson, supra*, because the durational residency requirement impacted upon the fundamental right of interstate travel. Similarly, the Camden ordinance seeks to place an absolute condition on an individual's right of interstate travel. Government may not abridge constitutional rights

Moreover, unlike *Sosna v. Iowa*, 419 U. S. 393 (1975), which upheld a one-year residency requirement for a divorce action within the state, on the ground that the Iowa statute only resulted in an inconvenient delay rather than foreclosing the newly arrived resident from obtaining a divorce, *Id.*, at 406, the denial of employment opportunities effected by the Camden ordinance irretrievably deprives all residents who have lived in Camden less than a year of the opportunity to pursue their chosen livelihood. In addition, unlike divorce, where the state has a vital interest in "requiring that those who seek a divorce . . . be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack," *Id.*, at 409, the problem of unemployment is of national scope, and cannot be solved at the expense of the plight of neighboring states.

Admittedly, bona fide residency requirement have been consistently upheld for municipal employees.[61] However, in each of these cases, the courts have consistently distinguished between continuing residency requirements at the time of employment, which are permissible, and durational residency requirements prior to employment,

60. (Cont'd.)

by direct action nor condition their exercise on their surrender. *Keyishian v. Board of Regents of New York*, 385 U. S. 589, 605 (1967).

61. *See, e.g., McCarthy v. Philadelphia Civil Service Comm'n, supra*, (fire department employee); *Wright v. City of Jackson, Mississippi*, 506 F. 2d 900 (5th Cir. 1975) (fire department employees); *Wardwell v. Board of Education of City School District*, 529 F. 2d 625 (6th Cir. 1976) (school teacher); *Andre v. Board of Trustees of Village of Maywood*, 561 F. 2d 48 (7th Cir. 1977), *cert. denied*, 434 U. S. 1013 (1978) (municipal employee); *Detroit Police Officers Association v. City of Detroit*, 385 Mich. 519, 190 N. W. 2d 97 (1971), *app. dismissed*, 405 U. S. 950 (1972) (police officer).

which the courts have indicated are invalid.[62] Thus, in *McCarthy v. Philadelphia Civil Service Comm'n, supra,* in a *per curiam* opinion upholding a continuing residency requirement for municipal employees, this Court stressed:

> We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus, in *Shapiro* . . . we stated "[T]he residence requirement and the one-year waiting period requirement are distinct and independent prerequisites," And in *Memorial Hospital* . . . quoting *Dunn* . . . the Court explained that *Shapiro* and *Dunn* did not question 'the validity of appropriately defined and uniformly applied bona fide residence requirements.' (citations omitted)

424 U. S. at 647. However, in upholding the Camden resident hiring quota, the New Jersey Supreme Court completely ignored this vital distinction.

Nor are the municipal hiring cases applicable to the case at bar. The Camden residency requirement is not being applied to public employees where the City is acting *qua* employer, but is being imposed upon non-municipal employees, who merely happen to have been hired by those contractors or developers with whom the City is doing business. None of the justifications which support a bona fide residency requirement when the city acts as employer are relevant when the city acts as regulator. This distinction was clearly articulated by the Minnesota Supreme Court in *Berg v. City of Minneapolis,* 274 Minn. 277, 143 N. W. 2d 200 (1966), where that Court, in upholding a continuing residency requirement

62. *Wright v. City of Jackson, supra,* 506 F. 2d at 902; *Wardwell v. Board of Education, supra,* 529 F. 2d at 627-28; *Andre v. Board of Trustees of Village of Maywood, supra,* 561 F. 2d at 52-3; *Mogler v. Sevier County School District,* 540 F. 2d 478, 483 (10th Cir. 1976), *cert. denied,* 429 U. S. 1121 (1977).

for police officers, distinguished *Construction and General Laborers Union Local 563 v. City of St. Paul, supra* (which had struck down a St. Paul ordinance compelling contractors who performed work for the City to employ only county residents) by stating:

> It did not involve government employment but dealt with the subject of people engaged in construction and general labor for contractors doing work on a city project. Such work does not involve public service of a kind which is considered permanent, is not integral to the welfare of the community nor a public service relied upon by citizens of the community in their everyday life. It does not disturb the well-established rule that public employment is not a right but a privilege, and the legislature may give the municipality the authority to impose reasonable restrictions upon the activities of the municipality as a part of their terms of employment . . . (citations omitted)

Id., 274 Minn. at 281, 143 N. W. 2d at 203.

In seeking to condition access to private employment upon length of residence, the classification created by the Camden residence requirement, "unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Memorial Hospital v. Maricopa County, supra*, 415 U. S. at 262. To make such a showing, the state has the heavy burden both of demonstrating that its interests are substantial and that the means adopted are narrowly drawn.

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve

> their legitimate objectives . . . and if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose, "less drastic means . . ." (citations omitted)

Dunn v. Blumstein, supra, 405 U. S. at 343.

Whether the test be that of a compelling state interest or even minimum rationality, the Camden residency requirement must fail. The classification employed by the ordinance is not even remotely tailored to further the city's purported interest in reducing unemployment. Rather than targeting the employment preference to the long term unemployed, the ordinance merely benefits long term residents. Moreover, rather than increasing the number of jobs, the ordinance simply limits the universe of those who may compete for them. Reducing unemployment may constitute a valid state interest, but it may not be achieved by means which are repugnant to fundamental constitutional rights.

IV. The Decision of the Lower Court Upholding the Camden Resident Hiring Quota Should Be Summarily Reversed, or in the Alternative, This Case Consolidated With *Mass. Council of Construction Employers v. Mayor of Boston.*

As demonstrated *supra,* we believe that the New Jersey Supreme Court committed serious constitutional errors in upholding the Camden resident hiring quota, and its decision should be summarily reversed. However, in the alternative, this matter should be consolidated with *Mass. Council of Construction Employers v. Mayor of Boston, supra,* which is now pending before this Court.

Consolidation will serve the interests of justice and judicial economy, by ensuring plenary consideration of

this issue which is of vital concern to the public. Thus, regardless of the Court's determination of the validity under the Commerce Clause of the Boston ordinance in *Mass. Council of Construction Employers v. Mayor of Boston, supra,* resident preference statutes still may be improper under the Privileges and Immunities Clause or Equal Protection Clause, issues which are not being raised at all in connection with the Boston ordinance. Moreover, unlike *Mass. Council of Construction Employers v. Mayor of Boston,* where the preference is imposed pursuant to an Executive Order, the ordinance in the case *sub judice* was passed pursuant to a state statutory scheme. Such a difference may have a significant impact on the constitutional validity of the ordinance.

As long as unemployment remains a national dilemma, states and their political subdivisions will continue to wrestle with appropriate responses. Consolidation of this case will permit this Court to provide much needed guidance to localities throughout this country and to correct serious constitutional errors.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to note probable jurisdiction of this appeal and resolve the substantial federal question submitted herein.

Respectfully submitted,

STEVEN K. KUDATZKY
JAMES KATZ
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN
41 S. Haddon Avenue
Haddonfield, New Jersey 08033
(609) 429-1100
Attorneys for Appellant

APPENDIX A

SUPREME COURT OF NEW JERSEY

A-79 September Term 1981

UNITED BUILDING and CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY and VICINITY,
Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Respondents.

Argued December 15, 1981—Decided February 18, 1982

On certification to the Department of Treasury.

Steven K. Kudatzky argued the cause for appellant (*Tomar, Parks, Seliger, Simonoff & Adourian*, attorneys).

Laurence E. Rosoff, City Attorney, argued the cause for respondent Mayor and Council of the City of Camden.

Joseph L. Yannotti, Deputy Attorney General, argued the cause for respondent The Department of the Treasury of the State of New Jersey (*James R. Zazzali*, Attorney General of New Jersey, attorney; *Andrea M. Silkowitz*, Deputy Attorney General, of counsel).

The opinion of the Court was delivered by PASHMAN, *J.*

This appeal of an administrative agency decision implicates the constitutional powers of both state and local government. At issue are two provisions of an ordinance enacted in 1980 by the City of Camden mandating affirmative action by private construction companies awarded public works contracts by the city government. Both provisions enact goals that exceed the minimum requirements in the State Treasurer's affirmative action rules, *R.* 1977, *d.* 364, *N.J.A.C.* 17:27-1.1 to 13.2, promulgated pursuant to the amendments to the Law Against Discrimination concerning affirmative action in public works contracting, *L.* 1975, *c.* 127, *N.J.S.A.* 10:5-31 to 38.

The first provision establishes a 25% minority [1] hiring goal for contracts with the City of Camden, which is more rigorous than the 20% goal set by the State Treasurer for all other public works contracts in Camden County. The second provision requires that 40% of the labor force in Camden City public works projects be city residents. The State Treasurer had set no residency quotas or goals. Appellant United Building and Construction Trades Council of Camden County and Vicinity (Council), an association of labor organizations, challenges State approval of the Camden program as both unauthorized under the Law

1. "Minority worker" for purposes of both the Camden ordinance and the State Treasurer's minority hiring guidelines includes the same persons. The Camden ordinance defines "minority" to include persons who are Black, Hispanic, Asians, American Indians or women. The Treasury Department rules define "minority worker" to include persons who are Black or Spanish-American, Asian or American Indian. *N.J.A.C.* 17:27-2.1. However, for purposes of the Department's minority hiring goals, "minority" also includes females. Thus, although females are not a numerical minority in this State, throughout the opinion "minority" includes women, unless otherwise indicated.

Against Discrimination, *N.J.S.A.* 10:5-1 to 38, and unconstitutional. The Court now holds that approval of these provisions by the State Treasurer was proper under the statute. We also hold that neither provision violates the United States or New Jersey Constitution, and that the resident hiring quota is not preempted by state statute.

I

The 1975 amendments to the Law Against Discrimination, mandating affirmative action in public works contracting, *L.* 1975, c. 127, *N.J.S.A.* 10:5-31 to 38, are typical of state and federal statutes that seek to use the government's purchasing power to promote equal opportunity in the construction trades. *See generally* Public Works Employment Act of 1977, 97 *Stat.* 116, 42 *U.S.C.* § 6701 *et seq.*; *Fullilove v. Klutznick*, 448 *U.S.* 448, 473, 65 *L.Ed.*2d 902, 921 (1980) (upholding federal affirmative action quotas for minority contractors). Under the act, state and local governments, in their roles as marketplace participants, require the contractors they hire to make efforts to employ more minority workers.

The affirmative action provisions do not directly affect contracts between private parties. The minority hiring goals pertain only to contracts with the State, its political subdivisions, and agencies or authorities created by state and local government. *N.J.S.A.* 10:5-32. In enacting the affirmative action amendments to the Law Against Discrimination, the Legislature chose to delegate the responsibility for promulgating specific hiring goals. The statute provides that no public works contract monies shall be paid to any contractor, subcontractor or firm that has not guaranteed compliance with an affirmative action program approved by the State Treasurer. *N.J.S.A.* 10:5-32. To this end, the statute empowers the State Treasurer

> a. To investigate and determine the percentage of population of minority groups in the State or areas thereof from which the work force for public works contracts is or may be drawn;
>
> b. To establish and promulgate such percentages as guidelines in determining the adequacy of affirmative action programs submitted for approval pursuant to section 2 of this act . . .
>
> [*N.J.S.A.* 10:5-36 (footnote omitted)]

The State Treasurer has discretion to promulgate specific affirmative action requirements as long as they are based on "the percentage of population of minority groups in the State or areas thereof," *N.J.S.A.* 10:5-36(a).

Pursuant to his statutory mandate, the State Treasurer promulgated comprehensive affirmative action rules in September 1977. *R.* 1977, *d.* 364, *N.J.A.C.* 17:27-1.1 to 13.2, which included "employment goals" for the hiring of minorities in each of New Jersey's 21 counties. *N.J.A.C.* 17:27-7.3. In light of the State Treasurer's power "[t]o require all State and local agencies awarding public works contracts to submit for approval their affirmative action programs," *N.J.S.A.* 10:5-36(c), the rules further provided for approval of any local affirmative action program that conforms to the statutory and administrative requirements, and "establishes an employment goal which is *not lower than* the applicable goal established by [*N.J.S.A.* 17:27-7.3]." *N.J.A.C.* 17:27-6.5 (emphasis added).

After the State Treasurer promulgated the 1977 affirmative action rules, a group of Camden citizens approached city officials to inquire about the enactment of an affirmative action program for city public works contracts. The mayor appointed Camden City attorney, Louis A. Vargas, to head a task force of city residents. By

May 1980, a proposed affirmative action ordinance had been drafted.[2]

On July 24, 1980 the Camden City Council adopted "an ordinance to establish an affirmative action program in connection with construction contracts to be performed for or on behalf of the City of Camden." The ordinance noted that according to 1977 U.S. Labor Department statistics, the unemployment rate for Camden was 11.5% compared with 8.1% state-wide and 7.6% county-wide. Unemployment among Black Americans in the city was 18.4%, and among Hispanic Americans 15.6%. The ordinance noted further that unemployment in Camden had increased significantly since release of the Labor Department statistics.

The ordinance applied to all contracts with the City of Camden involving more than $50,000. It provided that every public works contractor

> . . . shall make every effort to employ not less than 25% minority workers in the utilization of all trades, as tradesmen, journeymen and apprentices, in performance of his/her contract, whether or not the work is subcontracted.

The ordinance defined "minority" and listed several criteria for measuring good faith compliance.

Camden's affirmative action program was amended by a second ordinance, adopted on August 28, 1980. This

2. On May 8, 1980, Vargas sent a copy of the proposed ordinance to the Chief Affirmative Action Officer, Carl G. Briscoe, in the Department of Treasury for review and comment. On May 19, 1980, Briscoe responded to the Camden City attorney's inquiry. Briscoe listed several provisions—not relevant to this appeal—that the Camden ordinance required in order to meet minimum state requirements and receive state approval.

second ordinance provided, in addition to the minority hiring goal, that public works contractors "shall make every effort to employ persons residing within the City of Camden *but in no event shall less than 40% of the entire labor force be residents of the City of Camden.*" [Emphasis added.]

Both the July 24 ordinance and the August 28 amendatory ordinance were submitted on November 14, 1980 to Chief Affirmative Action Officer Briscoe for his approval. On November 24, 1980 Birscoe informed the city that the affirmative action program met minimum state requirements [3] and was approved by the State for the period November 24, 1980 through November 24, 1981.[4] Appellant now challenges this approval of the Camden affirmative action program by the Chief Affirmative Action Officer.

The Council did not participate in the procedure through which the Chief Affirmative Action Officer approved the Camden program. Because the Camden program met all the minimum requirements for state-approved plans, its approval by the Chief Affirmative Action Officer presumably was assured pursuant to *N.J.A.C.* 17:27-6.5. On December 17, 1980 the Council filed a Notice of Appeal with the Appellate Division, pursuant to *R.* 2:2-3, challenging the final determination of the Chief Affirmative Action Officer in approving the Camden plan.

On June 19, 1981 we directly certified the appeal to this Court to decide all issues in the case.

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3. Briscoe reminded the city that since its program applied only to contracts involving more than $50,000, state guidelines would apply to contracts covered by the Department rules and involving payment of less than $50,000.

4. On November 25, 1981, the Camden program was given provisional approval through January 1982. The city was asked to adopt certain procedures not relevant to this appeal.

II

A. *The Department of Treasury's Statutory Authority to Approve the Camden Ordinance.*

Appellant does not contend that the Chief Affirmative Action Officer has no statutory authority to approve local affirmative action plans. The 1975 amendments specifically give the Treasurer the power "[t]o require all State and local agencies awarding public works contracts to submit for approval their affirmative action programs." *N.J.S.A.* 10:5-36(c). Such a provision is superfluous if local government has no authority to promulgate plans that differ in some respects from the State Treasurer's guidelines. The Court presumes that the Legislature does not enact meaningless legislation. *McGlynn v. New Jersey Public Broadcasting Auth.*, — *N.J.* — (1981); 2A Sutherland, *Statutory Construction* (4th ed. 1973) § 46.06.

The Council focuses instead upon the specific decision of the Chief Affirmative Action Officer in approving the Camden ordinance. The Council first contends that although the State Treasurer is empowered to approve local affirmative action programs, the Law Against Discrimination provides no authority for approving hiring goals more rigorous than the applicable county-wide goal. Neither, according to the Council, does the statute provide authority for establishing any resident hiring quotas at all. The Council also contends that even if the State Treasurer can approve local minority hiring goals, the Department abused its discretion by approving Camden's more rigorous goal without any showing of necessity.

The standard of review applied to the State Treasurer's decision to approve the Camden minority hiring goal and resident quota is no different than the standard used to review any other final agency decision. As stated in *New Jersey Guild of Hearing Examiners v. Long*, 75 *N.J.* 544, 561 (1978),

> "[a]dministrative rules and regulations have in their support the rebuttable presumption of validity if they come within the ambit of delegated authority," and . . . . unless such regulations are "clearly *ultra vires* on their face, the party contesting them has the burden of proving their invalidity."
>
> [quoting *In re Regulation F-22, Office of Milk Industry*, 32 *N.J.* 258, 261-62 (1960)]

As a result of this "rebuttable presumption of validity, . . . an *ultra vires* finding is disfavored," *Id.* The grant of authority to an administrative agency is to be liberally construed to enable the agency to accomplish the Legislature's goals. The agency has "such implied incidental powers as may reasonably be adapted to that end." *In re Suspension of Heller*, 73 *N.J.* 292, 303 (1977).

In this case, the scope of the State Treasurer's delegated authority is clear. The relevant law is an amendment to the Law Against Discrimination. It bars public works contractors from discriminating on the basis of "age, race, creed, color, national origin, ancestry, marital status or sex." *N.J.S.A.* 10:5-33. At the same time, the statute mandates affirmative action in public contracting by outlawing public works contracts with any party "which has not agreed and guaranteed to afford equal opportunity in performance of the contract in accordance with an affirmative action program approved by the State Treasurer." *N.J.S.A.* 10:5-32. To this end, the State Treasurer is empowered to determine percentages of minority populations across the State, *N.J.S.A.* 10:5-36(a), and establish those populations as guidelines in determining the adequacy of affirmative action programs. *N.J.S.A.* 10:5-36(b). Unless the Chief Affirmative Action Officer's decision works "to alter the terms of [the] legislative enactment or frustrate

the policy embodied in the statute," *N.J. Chamber of Commerce v. N.J. Elec. Law Enforce. Comm'n*, 82 *N.J.* 57, 82 (1980), by impeding or acting arbitrarily with regard to promotion of equal opportunity in public works contracting through affirmative action, the decision will be affirmed.

1. *The 25% minority hiring goal.*

The State Treasurer's affirmative action rules include "employment goals" for the hiring of minorities in each of New Jersey's 21 counties. These goals range from a low of 10% in seven counties to a high of 32% in Essex County, reflecting the differing minority population in each area. The goals are clearly not equivalent to the minority populations in each county, since "minority workers" includes women, who we assume represent about 50% of the population in each county. The Camden County goal is 20%. The goal enacted by the City and approved by the State Treasurer is 25%

The State Treasurer's affirmative action rules also impose duties on contractors to undertake a good faith effort to comply with the minority hiring goal if the contractor fails to meet the minority hiring guidelines. *N.J.A.C.* 17:27-7.4. These duties range from seeking assurances of cooperation from unions to notifying minority referral organizations of hiring needs to notifying particular minority workers who are listed with the contractor as awaiting employment. *N.J.A.C.* 17:27-7.4(1), (2)(a)(b).

The amendments to the Law Against Discrimination, *N.J.S.A.* 10:5-31 to 38, say nothing about the specific geographical areas upon which minority hiring goals should be based. The statute does not mandate the use of county-wide hiring goals, as opposed to regional or local goals. The statute instead gives the State Treasurer broad authority "[t]o investigate and determine the percentage

or population of minority groups *in the State or areas thereof* from which the work force for public works contracts is or may be drawn." *N.J.S.A.* 10:5-36(a) (emphasis added). The provision clearly is intended to give the State Treasurer flexibility in establishing goals.

The State Treasurer has decided to establish county-wide goals, reflecting the different minority populations in the State's 21 counties. The use of county-wide hiring goals, however, does not preclude the adoption of different hiring goals within any county, particularly where the minority population varies significantly within different parts of the county.

This is precisely the situation that currently exists in the City of Camden within Camden County. Official 1980 U.S. Census Bureau statistics reveal a marked difference between the minority populations of the two areas. For example, the black population represents 53.0% of Camden City, versus 14.3% of Camden County. Further, 19.2% of Camden City residents identify themselves as being of Hispanic origin.[5] Assuming that about half the city population is female, we can conclude that at least 75% of Camden City residents, and perhaps as many as 90% of city residents, are "minority" workers for purposes of the Camden minority hiring goal. To require that persons con-

5. The 1980 U.S. Census Bureau statistics for the City of Camden show the following racial populations:

Total population	84,910
Caucasion	25,739
Black	45,008
American Indian/Eskimo	193
Asian/Pacific Islands	278
Other	13,692

A total of 16,308 city residents identified themselves as of Hispanic origin. It is not known how these persons identified themselves for purposes of the above racial classification.

tracting with the city make good faith efforts [6] to hire 25% "minority" workers cannot seriously be said to "adversely affect the legislative scheme . . . [or] stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature." *Fair Lawn Ed. Ass'n v. Fair Lawn Bd. of Ed.*, 79 *N.J.* 574, 586-87 (1979) (citations omitted). To the contrary, we would question the fairness of any hiring practices that under such circumstances resulted in construction work forces with substantially fewer than 25% minority workers. The State Treasurer's approval of the 25% minority hiring goal for public works contracts with Camden City is therefore neither *ultra vires* nor an abuse of agency authority under the Law Against Discrimination.

2. *The Camden resident quota.*

The Council argues that approval of Camden's residency quota requiring 40% of all public works contract employees to be city residents is *ultra vires* because the enabling legislation does not contemplate any residency requirement. The Council notes the comprehensive criteria upon which the contractor may not discriminate, including "age, race, creed, color, national origin, ancestry, marital status or sex." *N.J.S.A.* 10:5-33(a). It concludes that since this list excludes residency, the Treasury Department has no authority to approve any affirmative action plan including a residency requirement.

Local affirmative action programs doubtless contain many requirements that were not contemplated by the

6. Although the city's ordinance speaks in terms of making "every effort" to meet the minority hiring goals, as opposed to the State Treasurer's requirement of a "good faith" effort, the Camden ordinance speaks of "criteria for measuring good faith," and the additional criteria it requires to establish that compliance are minimal.

legislators who drafted the affirmative action law or the administrators who promulgated affirmative action rules. Such requirements may be authorized by the implied power of the localities under the Law Against Discrimination, *see New Jersey Guild of Hearing Aid Dispensers v. Long, supra,* 75 *N.J.* at 571, or by the general police power. They may or may not be constitutional or precluded by statute statute. Clearly, State Treasurer approval of a local affirmative action plan pursuant to the Law Against Discrimination does not immunize the plan against constitutional and statutory attack. But as long as the local plan meets the minimum state requirements, *N.J.A.C.* 17:27-6.5, and does not frustrate the statutory goals of affirmative action, *N.J.S.A.* 10:5-32, and equal opportunity, *N.J.S.A.* 10:5-33, in public works contracting, State Treasurer approval of a local plan including such a provision is not *ultra vires* or an abuse of discretion.

If the minority population of the City of Camden were less than that of the surrounding area, a resident hiring quota might impede the hiring of additional minority workers. The ordinance might then be found to "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature." *Fair Lawn Ed. Ass'n, supra.* But to the contrary, Camden has a higher percentage of minority population than other areas of the county. As a consequence, a duty to hire Camden residents could only increase the likelihood that any contractor will meet the State Treasurer's minority hiring goals. We therefore hold that the State Treasurer did not act outside the scope of his statutory authority under the Law Against Discrimination in approving the Camden ordinance.

We next address constitutional and statutory challenges to the affirmative action and resident hiring goals in the ordinance.

B. *Constitutionality of affirmative action hiring goals.*

In its brief, the Council states that it does not challenge the constitutionality of either the relevant amendments to the Law Against Discrimination, *N.J.S.A.* 10:5-31 to 38, or the State Treasurer's affirmative action rules, *N.J.A.C.* 17:27-.1.1 to 13.2. However, for purposes of constitutional analysis there is no distinction between a challenge to the particular minority hiring goal established for the City of Camden and a challenge to the State Treasurer's minority hiring goals in general. No argument can be made that approval of a 25% minority hiring goal for the City of Camden was arbitrary administrative agency action or action that in any other way violated appellant's constitutional due process rights. Moreover, even if we assume that municipalities have less authority than the State to legislate in affirmative action matters, a proposition we expressly decline to address, the assumption would have no relevance in this appeal. By approving the Camden plan, the State Treasurer has established a minority hiring goal for the City of Camden that operates no differently than every other minority hiring goal established by the State Treasurer pursuant to *N.J.S.A.* 10:5-36. The Council's constitutional challenge to the Camden minority hiring goal must therefore be interpreted as a challenge to the State Treasurer's general power to issue affirmative action hiring goals. *N.J.A.C.* 17:27-7.3.

We begin with the premise that the Camden minority hiring goal, like the 21 county-wide hiring goals promulgated by the State Treasurer, *N.J.A.C.* 17:27-7.3, is not a fixed quota. The ordinance does not mandate that the contractor hire 25% minority workers, but only that the contractor "make every effort to meet the [goal]." Appellant's contrary reading of the ordinance is not correct.[7]

7. In arguing that the Camden ordinance establishes an unconstitutional quota, appellant points to language in the ordinance

The ordinance's criteria for good faith compliance confirm that the hiring goals are not immutable quotas. At oral argument, the Department of Treasury made clear that it regarded the ordinance as establishing goals, not quotas. The Camden city attorney expressed no contrary opinion.

There is substantial precedent for mandating affirmative action by recipients of government contracts. The minority hiring goals in this case are less stringent than the State of New Jersey requirements for affirmative action in public contracting approved 11 years ago by a Federal District Court in *Joyce v. McCrane*, 320 *F.Supp.* 1284 (D.N.J. 1970). *Joyce* upheld the "Newark Plan," an affirmative action program promulgated by the State Treasurer pursuant to Federal Executive Order No. 11246 (1965) and New Jersey Executive Order No. 21 (1965). Executive Order No. 11246 required all contractors and subcontractors in federally financed projects to take affirmative action to see that applicants were not discriminated against on the basis of race, creed, color or national origin. In order to receive federal funds for a state medical school construction project, the State Treasurer promulgated an affirmative action plan setting up goals of 30% to 37% hiring of minority journeymen. As in this case, contractors faced no absolute quotas but faced sanctions if they failed to

7. (Cont'd.)

that although the hiring goals pertain to "every union/workman level," "in no event may the total man-hours worked" by minority members be less than the annual goals. We interpret this language to mean that although the contractor should attempt to hire at least 25% minority workers for each type of job involved in the project, in no event shall the *total* workforce be less than 25% minority workers, unless the contractor has been unable to meet the 25% goal after satisfying all criteria for good faith compliance. Any other interpretation would render superfluous the ordinance's repeated references to hiring "goals" and the criteria for measuring "good faith" compliance.

make a good faith effort at compliance. Judge Fisher approved of the Newark plan, expressly noting that hiring goals and not quotas were at issue.

> [T]he objectors to the implementing plan insist that it sets up "quotas" and is therefore invalid; however, the Plan merely sets up goals for minority employment. Sanctions cannot be imposed under the Plan if the contractors strive to meet these goals and fall short.
>
> [320 *F.Supp.* at 1291]

Similar hiring requirements placed upon public works contractors have been upheld by federal courts in cases which the Supreme Court declined to review. *See, e.g., Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 *F.*2d 159 159 (3rd Cir.), *cert.* den., 404 *U.S.* 854, 30 *L.Ed.*2d 95 (1971) (upholding the "Philadelphia Plan," requiring "every good faith effort" to meet hiring goals in six construction industry trades); *Associated Gen. Contractors of Mass., Inc. v. Altshuler,* 490 *F.*2d 9 (1st Cir. 1973), *cert.* den., 416 *U.S.* 957, 40 *L.Ed.*2d 307 (1974) (upholding the "Boston Plan" which required "a not less than twenty percent ratio of minority employee man hours to total employee man hours").

The above-mentioned affirmative action plans differ from the State Treasurer's plan in that they were promulgated pursuant to federal mandate, specifically the Civil Rights Act of 1964 and Executive Order 11246. Here the State Treasurer has acted pursuant to state legislation. *N.J.S.A.* 10:5-31 to 38. However, the states have no less constitutional authority than the federal government to remedy identified past discrimination. "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo,* 424 *U.S.* 1, 93, 46 *L.Ed.*2d 659, 730 (1976). The

discussion in *University of California Regents v. Bakke*, 438 *U.S.* 265, 57 *L.Ed.*2d 750 (1978), draws interchangeably from precedent involving Fourteenth Amendment challenges to state enactments and Fifth Amendment challenges to federal measures. *Compare Bakke, supra*, 438 *U.S.* at 291-310, 57 *L.Ed.*2d at 771-84 (Fourteenth Amendment challenge to state medical school admissions program), *with Fullilove v. Klutznick*, 448 *U.S.* 448, 480-89, 65 *L.Ed.*2d 902, 925-31 (1980) (Fifth Amendment challenge to Public Works Employment Act of 1977).

Fullilove v. Klutznick, supra, should lay to rest any doubts about the validity under the United States Constitution of state-imposed affirmative action requirements. In *Fullilove*, the United States Supreme Court approved the use of racial quotas as a remedy for past discrimination in general. The Court held that the remedy of affirmative action quotas need not be limited to cases of discrimination by a particular employer. *Fullilove* involved the "minority business enterprise" [MBE] provision of the federal Public Works Employment Act of 1977, 91 *Stat.* 116, which required a "10 per cent set-aside" of federal funds for minority businesses in state and local public works projects. The Court rejected the constitutional challenge that the MBE program "impermissibly deprives non-minority businesses of access to at least some portion of the government contracting opportunities generated by the Act." 448 *U.S.* at 484, 65 *L.Ed.*2d at 928. Although no single opinion commanded a majority, seven justices agreed that racial classifications are a permissible means of remedying the present effects of past discrimination, even though the present parties are innocent of discrimination. *See* Note, *The Supreme Court, 1979 Term*, 94 *Harv.L.Rev.* 125, 128 (1980).

The Council seeks to distinguish *Fullilove* on the grounds that no specific legislative or administrative find-

ings of past discrimination accompanied passage of the amendments to the Law Against Discrimination, *L.* 1975, *c.* 127, or promulgation of the State Treasurer's affirmative action rules, *R.* 1977, *d.* 364. Noting that the Supreme Court "has never approved race-conscious remedies absent judicial, administrative or legislative findings of constitutional or statutory violations," *Fullilove*, 448 *U.S.* at 497, 65 *L.Ed.*2d at 936 (Powell, J., concurring), appellant contrasts the legislative history accompanying the federal Public Works Employment Act upheld in *Fullilove* with the absence of such a legislative history in this case.

But the Court made clear in *Fullilove* that limited findings of past discrimination accompanying any particular enactment should not blind a court to other evidence of past discrimination which supports remedial legislation. Thus, the United States Supreme Court rejected the argument that Congress had made insufficient findings of past discrimination before passing the Public Works Employment Act. "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action." 448 *U.S.* at 503, 65 *L.Ed.*2d at 940 (Powell, J., concurring).

The legislation here was passed ten years after Governor Hughes issued Executive Order 21 to promote equal opportunity in State employment and State public works contracting. Like Executive Order 11246, its federal counterpart, the Governor's order was a clear response to past discrimination in the construction industry. The basis for the remedy of affirmative action in New Jersey public works projects was described thoroughly by the federal district court in *Joyce v. McCrane, supra.* Numerous studies have made New Jersey legislators and administrators aware of the under-representation of minor-

ity workers in the construction industry. *See, e.g.*, Office of Federal Contract Compliance, *Report of the Panel on Equal Employment Opportunities in the Construction Trades in Newark, New Jersey* (1970).

Only by making itself obvious to the well-documented history of minority under-representation in the construction trades in this State could the Court invalidate the challenged legislation and affirmative action rules on the basis of insufficient findings of past discrimination. It is one thing to dispense justice wearing the proverbial blindfold to ensure impartiality. It would be quite another matter to wear blinders blocking out the manifest evidence of past discrimination which underlies this remedial legislation.

The Council seeks additional support for its constitutional challenge in Article 1, par. 5 of the New Jersey Constitution and *Lige v. Town of Montclair*, 72 *N.J.* 5 (1976). In *Lige* we struck down the use of hiring and promotion quotas to remedy past discrimination by a local police and fire department. *Lige* involved a finding that the Town of Montclair used an employment exam that had a "disproportionately negative effect on blacks." Because the town did not offer sufficient evidence to establish that the tests were job related, the resulting presumption of discrimination was not rebutted.

Pursuant to its authority under *N.J.S.A.* 10:5-17, the Division of Civil Rights ordered that the town adopt a quota system requiring one minority fire fighter to be hired for every white applicant hired until there were at least 15 minority officers. A similar remedy affecting police department promotions was also ordered. The Appellate Division reversed the orders, 134 *N.J.Super.* 277, and the Supreme Court affirmed, holding that the remedial order violated the state constitutional rights of non-minority applicants for Montclair police and fire jobs and promotions.

The decision and the reasoning in *Lige* focused on the unfairness of rigid quotas. However, where minority hiring *goals* and not *quotas* are involved, the concerns behind the Court's result in *Lige* are not present. *Lige* struck down the Civil Rights Division's hiring and promotion quotas because they were "a rejection of the concept that the more or most qualified should be hired and promoted . . . It is the racial classification irrespective of qualification that mandates its invalidation." 72 *N.J.* at 22, 23.

While the State Treasurer's affirmative action requirements strongly encourage minority hiring, they do not require the contractor to hire non-qualified employees or to disregard meaningful differences in employee qualifications. The regulations require only that the contractor make a good faith effort to attain the minority hiring goal. Moreover, there is absolutely no indication that the hiring goals have operated, or will operate, to place less qualified employees in public works contracts. We note that no contractors engaged in public work, whose businesses would be most directly affected by having to hire less qualified employees, have sought to intervene in this suit.

Justice Schreiber was careful to note in *Lige* that the State need not be color-blind in its attempts to promote equal employment opportunity. 7, *N.J.* at 25 ("For example, . . . the Town might attempt to obtain more qualified black candidates by alerting black students in colleges and recent high school graduates of the job opportunities."); *see also* 72 *N.J.* at 53 (Pashman, J., dissenting). In *Morean v. Bd. of Montclair*, 42 *N.J.* 237 (1964), the Court sustained a plan for the transfer and assignment of pupils within a school district, although the proposal was admittedly racially motivated and avowedly sought to control racial balance as among the several junior high schools. And in *New Jersey Builders Ass'n v. Blair*, 60 *N.J.* 330

(1972), we unanimously affirmed the validity of a rule requiring owners of multiple dwellings to facilitate compliance with the Law Against Discrimination by filing annual reports disclosing rentals and requiring racial identification of tenants. Justice Mountain there approvingly cited the "Philadelphia Plan" case, *Contractors Ass'n of Eastern Pa., supra,* which, as described above, upheld a minority hiring plan similar to the plan at issue here.

Moreover, *Lige,* in discussing Title VII of the Federal Civil Rights Act of 1964, referred to a federal Court of Appeals case limiting use of racial quotas to instances where there has been

> "a clear-cut pattern of long-continued and egregious discrimination," and the effect of the reverse discrimination . . . [is] not . . . "identifiable," namely, that it is not concentrated on a relatively small group of non-minority persons.
>
> [72 *N.J.* at 19, quoting *Kirkland v. New York State Dept. of Correctional Serv.*, 520 F.2d 420, 427 (2d Cir.), *reh, en banc* den., 531 F.2d 5 (2d Cir. 1975)]

Both *Kirkland* and *Lige* preceded the United States Supreme Court opinion in *Fullilove v. Klutznick,* where the high Court for the first time approved of racial quotas under circumstances analogous to those in this case where the remedy is imposed throughout an entire industry rather than upon a particular employer.

The *Fullilove* opinion recognizes that past discrimination has placed non-minorities in a better position, and the victims of discrimination in a worse position, than each would have been in a color-blind society. Affirmative action is designed to remedy that systematic unfairness. We held in *Lige* that affirmative action in the form of a rigid

racial quota offends the State Constitution. Quotas are not at issue in this case. We hold today that the State Treasurer's minority hiring goals for affirmative action in public contracting, including approval of the 25% Camden City goal, violate neither the United States nor the New Jersey Constitution. Minority hiring goals with criteria for good faith compliance are a proper means of ensuring that contractors will take affirmative action to promote equal opportunity in an industry where minorities have been severely under-represented.

C. *Constitutionality of Resident Hiring Quotas for Local Public Works Projects.*

Appellant attacks the portion of the Camden affirmative action plan that requires that 40% of all persons hired for city public works projects be city residents, claiming violations of the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause. Conceding that municipalities can constitutionally require that their employees be city residents, *see McCarthy v. Philadelphia Civil Service Comm'n*, 424 *U.S.* 645, 47 *L.Ed.*2d 366 (1976) (upholding Philadelphia ordinance requiring city employees to be city residents); *Detroit Police Officers Ass'n v. Detroit*, 385 *Mich.* 519, 190 *N.W.*2d 97 (1971), appeal dismissed for lack of substantial federal question, 405 *U.S.* 950, 31 *L.Ed.*2d 227 (1972) (upholding residency requirement for police officers); *Abrahams v. Civil Service Comm'n*, 65 *N.J.* 61 (1974) (upholding residency requirement for Newark city employees), appellants distinguish this case as involving the imposition of hiring quotas upon private contractors. While appellant's characterization of the Camden ordinance is accurate, we do not agree that the distinction deprives the ordinance of its constitutional validity.

1. *The Commerce Clause*

Although the Commerce Clause speaks only in broad terms of giving Congress authority to "regulate commerce . . . among the several states," *U.S. Const.*, Art. I, sec. 8, the Supreme Court has often invoked the clause to strike down state legislation that unreasonably impedes the flow of commerce across state lines. *See, e.g., Toomer v. Witsell*, 334 *U.S.* 385, 92 *L.Ed.* 1460 (1948) (invalidating a South Carolina requirement that shrimp boats fishing off its coast dock in the state and pay taxes on their catches before transporting them interstate); cases collected in *Hughes v. Alexandria Scrap*, 426 *U.S.* 794, 805-06, 49 *L.Ed.*2d 220, 229 (1976). The Supreme Court has applied the Commerce Clause to municipal enactments that unreasonably burdened interstate commerce. *See Dean Milk Co. v. Madison*, 340 *U.S.* 349, 95 *L.Ed.* 329 (1951) (striking down a city ordinance barring the sale of milk unless processed at an approved pasteurization plant within five miles of the city).

All of the leading cases invalidating state and local legislation under the Commerce Clause, however, involve state taxes and regulatory measures impeding *private* trade in the national marketplace. *See H.P. Hood & Sons v. Du Mond*, 336 *U.S.* 525, 539, 93 *L.Ed.* 865 (1949) (referring to state "home embargoes," "customs duties" and "regulations" excluding imports). In this case, the City of Camden is not regulating the flow of commerce between private parties. The city is acting in the role of market *participant*, not market *regulator*. This distinction is crucial for purposes of Commerce Clause analysis. In *Hughes v. Alexandria Scrap, supra*, the United States Supreme Court determined that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market

and exercising the right to favor its own citizens over others." 426 *U.S.* at 810, 49 *L.Ed.*2d at 231. *Alexandria Scrap* concerned a Maryland program designed to remove abandoned automobiles from the state's roadways and junkyards. The state's requirements for vehicle documentation made it effectively impossible for out-of-state processors to sell abandoned automobiles to the state. Nonetheless, the Court upheld the statute, stating that "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur," *id.* at 806, but rather it has entered the market as a purchaser and restricted "its trade to its own citizens or businesses within the State." *Id.* at 808.

In *Reeves, Inc. v. Stakes*, 447 *U.S.* 429, 65 *L.Ed.*2d 244 (1980), the Court reaffirmed its approach giving the States broad power to prefer their own citizens when acting as market participants. The Court held that the South Dakota Cement Commission did not violate the Commerce Clause by its decision to give state buyers an absolute preference in fulfilling their requirements for cement in times of shortage. The Court noted,

> The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. . . . Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people," and "the long recognized right of trader or manufacturer . . . to exercise his own independent discretion as to parties with whom he will deal."
>
> [447 *U.S.* at 436, 439 (citations and footnote omitted)]

This Court has endorsed the principle that the state as market participant has freedom to favor its own citizens

and choose the parties with whom it will deal. In *K.S.B. Tech. Sales v. No. Jersey Dist. Water Supply*, 75 *N.J.* 272, 298 (1977), Justice Schreiber, writing for a unanimous Court, noted that a state's "purchase of goods and materials for its own end use . . . is not subject to the usual Commerce Clause restrictions." The Court upheld a statute requiring contractors with state and local government to buy only American products. *Cf. McGlynn v. N.J. Public Broadcasting Auth.*, — *N.J.* — (1981) (federal communications law does not preempt state rules ensuring candidate access to a state-owned television station where State is acting in its role as proprietor of the State's public stations).

There is no question that if the City of Camden were engaged in its own public works construction, it could require that all employees on the job be city residents. When the government decides to purchase those services rather than perform them itself, it retains constitutional power to prefer its own citizens, at least to some extent. *See McCarthy, supra; Abrahams, supra.* The decision of South Dakota to prefer its own citizens as purchasers in time of emergency shortage is particularly apposite to the instant case. We have recently described the severe economic plight that has befallen the City of Camden. *City of Camden v. Skokowski*, — *N.J.* — (1982). It is not the purpose of the United States Constitution to stifle the legitimate attempts of state and local governments to deal effectively with their social ills.

We are aware of the recent decision of the Supreme Judicial Court of Massachusetts invalidating resident hiring quotas for Boston public works projects. *Mass. Council of Construction Employers v. Mayor of Boston*, — *Mass.* —, 425 *N.E.*2d 346 (1981), *cert.* granted *sub. nom. White v. Mass Council of Construction Employees*, — *U.S.* —

(1982). The Massachusetts court relied almost entirely on *Hicklin v. Orbeck*, 437 *U.S.* 518, 57 *L.Ed.*2d 397 (1978). *Hicklin* involved the "Alaska Hire" law, a state statute requiring that all Alaskan oil and gas leases, easements and other related agreements contain a requirement that qualified Alaska residents be given preference in hiring. Because the law applied to *"all employment which is a result of* oil and gas leases," it "extend[ed] to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State." 437 *U.S.* at 529-30, 57 *L.Ed.*2d at 407 (emphasis in original). In short, the state in *Hicklin* was acting in its role as market regulator rather than market participant. We find unpersuasive the Massachusetts court's adaption of the reasoning of *Hicklin* to the context of the Commerce Clause, particularly in light of the Supreme Court holding in *Reeves, Inc. v. State, supra.*

As the Supreme Court noted in *Reeves*, "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis." 447 *U.S.* at 439, 65 *L.Ed.*2d at 253. Given these factors, the Court concluded, "the adjustment of interests in this context is a task better suited for Congress than this Court." *Id.* We concur in the high Court's reasoning, and we uphold the constitutionality of the Camden resident quota, with the understanding that our Legislature is free to determine that the "competing considerations" militate against allowing municipalities to prefer their own residents for public works contracting.

2. *The Privileges and Immunities Clause.*

Unlike the Commerce Clause, the Privileges and Immunities Clause speaks explicitly in terms of affording con-

stitutional protection against the actions of other States. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *U.S. Const.* Art. IV, sec. par. 1.

The purpose of the Privileges and Immunities Clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Hicklin v. Orbeck*, 437 *U.S.* 518, 524, 57 *L.Ed.*2d 397, 403 (1978), quoting *Paul v. Virginia*, 8 *Wall.* 168, 180, 19 *L.Ed.* 357 (1869).

For this reason the clause is not invoked to strike down local ordinances that favor city residents. Clearly, the Camden affirmative action plan does not aim primarily at out-of-state residents. It most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents. Because the Camden ordinance does not affect "the States . . . treatment of each other's residents," *Hicklin, supra*, 437 *U.S.* at 523, 57 *L.Ed.*2d at 403, it does not violate any privilege of state citizenship.

In *Mass. Council of Employers, supra*, the Massachusetts high Court rejected the privileges and immunities attack on Boston's resident quota in public works contracts "because the discrimination adversely affects citizens of the Commonwealth as well." 425 *N.E.*2d at 354.[8] This Court likewise declines to apply the Privileges and Im-

8. The Massachusetts court in *Mass. Council*, and the New York Court of Appeals in *Salla v. County of Monroe*, 48 *N.Y.*2d 514, 399 *N.E.*2d 909 (1979), did however invoke the Privileges and Immunities Clause to strike down statutes that gave hiring preferences in public works contracts to all citizens of their *respective* states.

New Jersey's mandatory preference for State citizens in public works contracts, *N.J.S.A.* 34:9-2, was held violative of the Privileges and Immunities Clause by Judge Dreier in *Neshaminy Constructors, Inc. v. Krause*, 181 *N.J.Super.* 367 (Ch.Div. 1981).

munities Clause in the context of a municipal ordinance that has identical effects upon out-of-state citizens and New Jersey citizens not residing in the locality.

3. *The Equal Protection Clause.*

Appellant contends that the Camden resident hiring quota offends the Equal Protection Clause by infringing upon the fundamental right to travel recognized in *Shapiro v. Thompson*, 394 *U.S.* 618, 22 *L.Ed.*2d 600 (1969). The Court rejects appellants' challenge for the same reasons that the Court has rejected equal protection attacks on the power of municipalities to hire only their own residents as city employees.

Residency requirements for municipal employees have almost universally been upheld under the Equal Protection Clause as a rational means of furthering the city's public welfare. *See McCarthy, supra;* Note, *Municipal Residency Requirements and Equal Protection*, 84 *Yale L.J.* 1684 (1975). In *Kennedy v. City of Newark*, 29 *N.J.* 178 (1959), Chief Justice Weintraub described the constitutional justification for residency requirements:

> * * * Government may well conclude that residence will supply a stake or incentive for better performance in office or employment and as well advance the economy of the locality which yields the tax revenues. [29 *N.J.* at 184]

The Supreme Court's recognition of the right to travel as a "fundamental right" in *Shapiro v. Thompson*, 394 *U.S.* 618, 22 *L.Ed.*2d 600 (1969) (striking down one-year durational residency requirements for welfare benefits), created doubts as to the validity of *Kennedy v. City of Newark*. But this Court explicitly rejected the "right to travel" argument in again upholding Newark's employee

residence requirement in *Abrahams v. City of Newark, supra.*

The right to employment on a local public works project, like the right to a city job, is not fundamental for purposes of equal protection analysis. Therefore, discrimination against non-residents of Camden does not offend the Equal Protection Clause if it has a rational basis. *Allied Stores of Ohio v. Bowers,* 358 *U.S.* 522, 528, 3 *L.Ed.*2d 480 (1959). The rational reasons for a city's decision to hire its own residents in direct employment, discussed by Chief Justice Weintraub in *Kennedy v. City of Newark, supra,* apply just as forcefully in the context of city contracting for public works projects. The severe unemployment in Camden and the need for economic revitalization, noted by this Court in *City of Camden v. Skokowski, supra,* further support the rationality of resident hiring quotas. The 40% resident hiring quota for Camden public works thus does not offend the Equal Protection Clause.

D. *State Preemption of the Camden Resident Hiring Quota.*

This Court's approach to state preemption parallels the federal analysis. When a state statute has preempted a field by supplying a complete system of law on the subject, an ordinance dealing with the same subject is void. *Ringlieb v. Parsippany-Troy Hills Tp.,* 59 *N.J.* 348 (1971) (State regulation of solid waste disposal); *Summer v. Teaneck,* 53 *N.J.* 548 (1969) (ordinance designed to prevent blockbusting); *Mogolefsky v. Schoem,* 50 *N.J.* 588 (1967) (licensing of real estate brokers). A legislative intent to preempt the field need not be expressly stated. "[W]here a legislative enactment, either expressly or impliedly, is intended to be exclusive in the field, preemption will be found," *Garden State Farms, Inc. v. Mayor Louis Bay, II,* 77 *N.J.* 439, 450 (197[illegible]).

However, Art. IV, sec. 6, par. 11 of the *N.J. Const.* mandates a liberal construction of legislation in favor of local authority. Therefore, a legislative intent to supersede local powers must clearly be present. *Kennedy v. City of Newark*, 29 *N.J.* 178, 187 (1959). As explained by former Chief Justice Weintraub,

> The ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act.
>
> [*Summer v. Teaneck*, 53 *N.J.* 548, 555 (1969)]

In this case no statute expressly precludes the 40% resident hiring quota that Camden has imposed upon public works contractors. Moreover, the Legislature clearly has not preempted the field in the area of local residency requirements, having given local governing bodies discretion regarding the use of residency requirements for officers and other employees. *N.J.S.A.* 40A:9-1.3. The appellant Council therefore must argue that the Legislature has impliedly preempted the field by expressing a clear intent not to allow municipalities to place hiring restrictions on public works contractors. The Council's argument has two separate thrusts, relying both on residency requirement statutes and on the Local Public Contracts Law, *N.J.S.A.* 40A:11-1 to 40. Both arguments are unconvincing.

The Council argues that in granting a preference for all "citizens of the state of New Jersey" in public works contracts for the state and its subdivisions, *N.J.S.A.* 34:9-2, the Legislature clearly intended to preclude local resident quotas, since the quotas work against citizens of New Jersey who live outside of the locality that has enacted

the quota. The implication that appellant seeks to draw is simply too tenuous. All Camden City residents are also New Jersey residents. In no way, therefore, does the Camden resident quota frustrate the Legislature's purpose of maximizing the employment of New Jersey residents in state and local public construction.

Likewise, the contention that the Legislature clearly intended to preclude the Camden resident quota because it has explicitly provided for residency requirements in direct local hiring, *N.J.S.A.* 40A:9-1.3, but not in local public works contracting, is weak. A similar argument was rejected by this Court in *Kennedy v. City of Newark, supra.* There the petitioner argued that because a state statute required residency of municipal officers, but not of municipal employees, the City of Newark was precluded from placing a residency requirement upon city employees who were not officers. 29 *N.J.* at 186. The Court found no evidence of an intent to preempt the Newark ordinance by implication. *Id.* at 186-87.

The lack of legislation concerning local resident quotas in public works contracting is natural, given that such requirements have rarely if ever been enacted in this State. The Legislature of course has the authority to forbid or to regulate local resident quotas such as that enacted by the City of Camden. There is no indication, however, that the Legislature has already chosen to do so.

Appellant contends also that the Camden resident quota is preempted by Section 13 of the Local Public Contracts Law. *N.J.S.A.* 40A:11-13. That statute prevents municipalities from imposing specifications upon private contractors "not directly related to the purpose, function or activity" for which the contract is made. *N.J.S.A.* 40A:11-13(a). The statute also expressly precludes the

requirement that any bidder be a resident of the city or county in which the contract will be performed. *N.J.S.A.* 40A:11-13(b). The law's explicit purpose is to encourage open and competitive bidding.

There is no indication that the Camden resident hiring quota has disrupted, or will in any way disrupt, the competitive bidding for Camden public works contracts. Unlike the affirmative action ordinance invalidated in *Arington v. Associated Gen. Contractors,* 403 So.2d 893 (Ala. 1981), which required that at least 10% of each contract amount be spent with minority subcontractors or suppliers, the Camden ordinance does not exclude any contractor, subcontractor or supplier from any work awarded by the city, provided that the affirmative action requirements are followed. Although it is possible that some contractors with permanent work crews will refrain from bidding on Camden public works projects, the record contains absolutely no evidence to support that assumption. Our State Constitution mandates a liberal construction of legislation in favor of local authority. Art. IV, § 7, par 11. The Court will not override this constitutional power based on mere speculation.

Appellants thus have made no showing that any state legislation preempts the 40% resident hiring quota in the August 1980 City of Camden ordinance.

III

In approving the Camden affirmative action ordinance, the State Treasurer did not act outside the scope of his statutory authority under the Law Against Discrimination, *N.J.S.A.* 10:5-1 to 38. Neither was his approval an abuse of administrative agency discretion. The State Treasurer's minority hiring goals, including the 25% goal for the City of Camden, do not violate the Equal Protection Clause. The 40% resident hiring quota for Camden public works

projects is also constitutional and is not preempted by state statute. We therefore affirm the decision of the Chief Affirmative Action Officer of the Department of Treasury in approving the Camden affirmative action plan pursuant to *N.J.A.C.* 17:27-6.5. Other relief sought by appellant is denied.

Chief Justice Wilentz and Justices Clifford, Schreiber, Handler, Pollock and O'Hern join in this opinion.

APPENDIX B

SUPREME COURT OF NEW JERSEY

DOCKET NO. A-79
SEPTEMBER TERM, 1981

UNITED BUILDING and CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY and VICINITY,
Appellant,

v.

MAYOR and COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,
Appellees.

TO: Stephen W. Townsend
Clerk, Supreme Court of New Jersey
CN970

Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that the United Building and Construction Trades Council of Camden County and Vicinity, the appellant above-named, hereby appeals to the Supreme Court of the United States from that portion of the final judgment of the Supreme Court of the State

of New Jersey, which upheld the constitutionality of a municipal ordinance requiring at least 40 per cent of the employees hired by private contractors engaged in public works construction projects with the City of Camden, be municipal residents for one year prior to employment. The judgment in this action was entered on February 18, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

BY: /s/ STEVEN K. KUDATZKY
STEVEN K. KUDATZKY
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
Attorneys for Appellant
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100

Dated: April 22, 1982

Certificate of Service

I hereby certify that one copy of this Notice of Appeal to the Supreme Court of the United States was mailed on this date, by first class mail, postage prepaid, to all of the parties listed below:

Lawrence E. Rosoff, Esquire
City Attorney for the City of Camden
Department of Law
City Hall
Camden, New Jersey 08101

Irwin I. Kimmelman, Esquire
Attorney General of New Jersey
CN080
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

I further certify that all parties to be served with this Notice of Appeal have been served.

By: /s/ Steven K. Kudatzky
Steven K. Kudatzky
Tomar, Parks, Seliger, Simonoff & Adourian
Attorneys for Appellant
41 S. Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100

Dated: April 22, 1982

APPENDIX C

JJL:db
7-24-80

Ordinance MC 1650 Adopted August 28, 1980

AN ORDINANCE TO ESTABLISH AN AFFIRMATIVE ACTION PROGRAM IN CONNECTION WITH CONSTRUCTION CONTRACTS TO BE PERFORMED FOR OR ON BEHALF OF THE CITY OF CAMDEN

WHEREAS, the City Council of the City of Camden recognizes its legal and moral obligation to promote and preserve the economic well-being of all citizens of the City of Camden; and

WHEREAS, the City Council of the City of Camden in viewing the present economic conditions which confront minority citizens within the City of Camden and said minority citizens make up a significant portion of the population of the City of Camden; and

WHEREAS, the present economic conditions nationwide do affect, in an adverse fashion, the economic well-being and status of minority citizens of the City of Camden in such a way as to elevate the amount of unemployment within the City of Camden above the levels that exist County-wide and State-wide; and

WHEREAS, the City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and County-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, un-

employment among Black Americans was 18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures as to Black and Hispanic unemployment were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly making the problem of unemployment even more grave than that which existed when the figures were compiled; and

WHEREAS, the City Council of the City of Camden, by the adoption of an Affirmative Action Program, seeks to relieve the problem of unemployment among its residents and citizens and seeks to promote the growth of minority involvement in construction and obtaining contracts for minority-owned businesses; and

WHEREAS, the City of Camden, in concert with the State of New Jersey and the Federal Government, supports the concept of seeking to grant a definite portion of all construction trade-related contracts and jobs, funded by local, state and/or federal monies, to minority contractors and employees; now, therefore

BE IT ORDAINED by the City Council of the City of Camden, as follows:

I. *Definitions*

For the purpose of the contract or grant, unless the context indicates a different meaning:

1. Developer/Contractor means any party performing or offering to perform a contract for public construction in the City of Camden.

2. Minority includes persons who are either Black, Hispanic or women, as those terms are defined herein:

(a) Black: All persons having origins in any of the Black racial groups of Africa.

(b) Hispanic: All persons of Mexican, Puerto Rican, Cuban, Central or South American origin, regardless of race.

(c) Women: All Females.

(d) Asians and American Indians.

3. Minority-owned business or minority-owned business enterprise means any business enterprise of which a minimum of 51% of the beneficial interest in such business enterprise is held by individuals who are members of a minority, as defined above, and that a minimum of 51% of the net profit or loss is attributable to such minority members, and which is certified by the Affirmative Action Review Council as such. For the purpose of qualifying as a certified minority-owned business enterprise, a spouse is deemed to be the owner of the other spouse's beneficial interest in a business enterprise.

4. Sub-contractor means any contractor who takes a portion of a contract from a developer/contractor or another sub-contractor.

5. Resident of the City of Camden is any person who has been domiciled in the City of Camden for a continuous period of twelve (12) consecutive months prior to the application for employment and continues as a domiciliary of the City of Camden during the term of employment or contract. For the purpose of this ordinance a resident must be a domicile of the City of Camden expressing an intention to make this City his permanent place of residence.

II. *Applicability of Ordinance*

Wherever the City of Camden spends funds derived from any public source for construction contracts or

where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply, except as provided in Section XII. The Director of the appropriate City Department granting or letting the contract will advise the appropriate state and federal agencies and officials of the standards set forth under this ordinance and request compliance with this ordinance. The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or less.

III. *Establishment of a Camden Affirmative Action Review Council*

In order to facilitate the implementation of this ordinance, there shall be established an Affirmative Action Review Council.

a. The Affirmative Action Review Council shall consist of seven (7) members and the original composition of such Council shall consist of four (4) members who shall be appointed for a term of two (2) years and three (3) members who shall be appointed for a term of one (1) year; and, thereafter, members of such Council shall serve for a term of two (2) years.

b. Members of the Affirmative Action Review Council shall be appointed by the Mayor with the advice and consent of City Council. The appointing authority shall make every effort to include as part of the Affirmative Action Review Council representation from organized labor, contractor's associations, government and the minority community.

c. Members of the Affirmative Action Review Council may be removed for non-performance or neglect

of duties or for other good cause by the Mayor with the advice and consent of the majority of City Council, or may be removed by an affirmative vote of two-thirds of the City Council.

d. Members of the Affirmative Action Review Council shall serve without compensation.

e. Vacancies in the Affirmative Action Review Council, for whatever reason, shall be filled in the manner herein provided for new appointments.

f. The Affirmative Action Review Council shall adopt appropriate rules and procedures for the regulation and conduct of their meetings.

IV. *Developer/Contractor's Contracting Obligations*

a. The developer/contractor to whom this ordinance is applicable, shall submit to all contractors and sub-contractors copies of this ordinance and shall make compliance with it, a specification of all bids. The developer/contractor shall require that by submitting a bid, a contractor or sub-contractor certifies that he/she will comply with the requirements of this ordinance.

b. The developer/contractor, in engaging individuals for employment, shall make every effort to fulfill the purpose of this ordinance by engaging for employment as many residents of the City of Camden as is reasonable and practicable to fulfill the purpose of this ordinance and to complete the designated construction project.

c. The developer/contractor shall make every effort to employ not less than 25% minority workers in the utilization of all trades, as tradesmen, journeymen and apprentices, in performance of his/her contract, whether or not the work is sub-contracted.

The above goal is expressed in terms of man-hours to be worked by minority members in each trade and at every union-workmen level or equivalent; however, in no event may the total man-hours worked by minority members during the performance of the contract be less than the annual goals established above.

d. The developer/contractor shall ensure that any sub-contractor working on any part of the project under the sub-contract exceeding $25,000.00 and involving man-hours in excess of eighty (80) hours, shall have 10% of all journeymen hours worked by minority apprentices in each trade. This shall apply to all specialty trades or craft unions, but not limited to pneumatic tubing, cabinet makers/finishers, heating/electrical temperature controllers and curb and sidewalk installers.

e. In the event a developer/contractor or subcontractor does not meet the requirements and goals established in this section, the criteria for measuring good faith compliance contained in Section XI(a), shall apply.

f. The collective bargaining agreements between the various contractors and sub-contractors and their various unions shall remain in force and effect. Any preexisting contract which would, by its terms, preclude compliance with the terms of this ordinance shall not, in and of itself, serve as the basis or justification for non-compliance.

g. The general contractor or sub-contractor will notify the Camden Affirmative Action Officer whenever he has reason to believe that any union which has a hiring hall or referral arrangement or an apprenticeship program engages in such referral, membership, admission or other practices as will substantially impede the contractor in his efforts to meet his Affirmative Action obligations, under this ordinance.

h. The contractor and each sub-contractor whose contract(s) exceeds $25,000.00, shall develop and submit a Manning Table. This document shall identify his estimated manpower requirements for the duration of the job broken down by trade and month. The manning of the job shall be related to this document which shall be brought up to date as required, but not less than once monthly.

i. The contractor shall submit copies of his collective bargaining agreement covering workers to be employed on the project, and copies of such bargaining agreements of each sub-contractor.

j. The contractor shall designate a principal officer of his firm to be responsible for administering the Affirmative Action Program detailed herein. This officer shall meet regularly, or as may be required, with the Affirmative Action Officer for Camden and/or the Review Council to ensure attainment of the goals set forth herein and the implementation of the training program. Included in this obligation is the requirement that each sub and prime contractor keep and maintain records for all trainees so that separate payroll amounts and descriptions of payments, training progress, together with all benefits, are recorded separately.

V. *Pre-Award Conference*

At the pre-award, prior to award, the apparent low bidder and the known principal sub-contractors, including, but not limited to, those performing major items of work such as heating, electrical, plumbing, etc., will be required to attend a pre-award conference with the City's Affirmative Action Program relating to Equal Employment Opportunity as provided in the information to bidders.

At the pre-award conference, an evaluation will be made of the adequacy of the contractor's plan as outlined in the pre-award documents.

The evaluation of the contractor's plans shall demonstrate his commitments to:

a. Cooperate with the unions with which the contractor has agreements in the development of programs to assure qualified members of minority groups of equal opportunity in employment in the construction trades.

b. Improve opportunities for the upgrading of the minority group members of the construction force.

c. Actively seeks union membership for qualified minority members of the construction force.

d. Make certain that all recruiting activities are carried out on a non-discriminatory basis.

e. Make known to all of the sub-contractors, employees and sources of referral, its equal employment oportunity policy.

f. Encourage minority group sub-contractors to bid for sub-contracting work.

g. Demonstrate how minimum requirements, as set forth in the within ordinance, will be met.

h. Any contract that would implicitly preclude compliance with the terms of the within ordinance shall not be considered within this context.

VI. *Reporting Requirements*

a. The contractor must submit the contractor's weekly payroll records for all crafts covered under the contract provisions. In addition, a monthly cumulative summary of project man-hours must be provided on a

craft-by-craft basis and identify as to minority or non-minority status.

b. The contractor will permit access to weekly certified payroll records for all crafts covered under the contract provisions.

c. The contractor will, on the last working day of each month, report to the City of Camden's Affirmative Action Officer, a written narrative of his efforts to ensure compliance with this ordinance. The report will include an appraisal as to the effectiveness of the contractor's program and will specify those factors and conditions which impede, restrict or account for less than complete success of the program.

Contractor Monitoring. The contractor shall continually monitor all personnel activities to ensure that the Affirmative Action Program is being carried out.

Criteria for Measuring Good Faith:

a. The contractor will consider for employment journeymen, basic trainees, advanced trainees and apprentices, persons referred to him by any training source approved by the Review Council. If the contractor does not employ any person so referred, he shall submit a written explanation by close of day to the Review Council.

b. Opportunities for minority participation in proposed projects will be submitted to the Affirmative Action Review Council who shall place notifications in area publications, including minority publications and non-profit minority organizations.

c. Information shall be supplied to all minority organizations who seek said information by request directed to the Affirmative Action Review Council.

d. A contractor shall not be deemed to have exercised good faith under this agreement solely because of union opposition, even if the unions threaten a work stoppage because of the implementation of this plan. It shall be incumbent upon the contractor, as employer, to see to it that referrals under this plan are treated fairly by the unions and their members.

e. If monitoring reveals significanct non-compliance, the Affirmative Action Review Council will examine attempts at compliance measured by the criteria set forth under Section IV and Section VI of this ordinance and attempt to reach an amicable agreement within the parameters of this ordinance. Continued non-compliance, and a lack of an amicable solution thereto, shall result in a referral of the matter to the Department of Administration.

VII. *Union Statements*

When a contractor has a referral agreement or arrangement with a union covering workers to be employed on a project to which this ordinance applies, such contractor shall submit with his/her bid a statement signed by an authorized union official, in which the union agrees as follows:

1. Said union is aware of the terms, conditions and goals of the within ordinance.

2. Said union is aware of the position of the City of Camden as the third party beneficiary with regards to the right to recover monetary damages on behalf of those adversely affected by non-compliance with the within ordinance.

3. Said union shall make a good faith attempt to assist the contractor and/or sub-contractor, as the case may be, to comply with the terms, conditions and goals set forth within this ordinance. The contractor will

promptly notify the developer and the Review Council of any failure on the part of a union to comply with the provisions of the above described statement. If a union has refused to sign the statement described above, the contractor will document his/her efforts to obtain such statement, including a description with the reasons given by the union for not signing such statement, and submit such documentation, together with his/her bid. A bid shall be deemed unresponsive if unaccompanied either by an acceptable union statement or by documentation as to why such statement could not be obtained. In addition, the award of a contract or a sub-contract will not be approved if such contractor has not submitted an acceptable union statement, or an explanation of the failure to obtain a statement. The failure of the union to sign the statement described above does not excuse the contractor from his/her obligation to comply with the conditions and provisions of this ordinance.

VIII. *Sub-contractors*

The developer shall require that each prime contractor is responsible for the performance of his sub-contractors in the implementation of the aforementioned equal employment requirements during the performance of the contract. Whenever the contractor sub-contracts a portion of the work on the project, the sub-contract shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he were the contractor. Furthermore, the contractor must include a provision in all contracts with sub-contractors to ensure compliance with all other conditions included herein, as well as with the New Jersey Executive Order 21 and *N.J.S.A.* 10:2-1 through *N.J.S.A.* 10:2-4, the President's Executive Order No. 11246 (C.F.R. 12319-25), *N.J.S.A.* 10:5-31, *et seq.* and Chapter 127 of Public Laws of 1975.

IX. *Nondiscrimination*

The contractor shall not discriminate against employees and applicants for employment on the grounds of union membership or on the grounds of race, color, religion, sex, age, national origin and handicap.

X. *Non-compliance*

In the event of failure by the contractor to meet his minority manpower commitments under this ordinance, he shall be given an opportunity to demonstrate that he has made every good faith effort to meet the manpower commitments. In any proceeding in which such good faith is in issue, all of the actions of the contractor, in seeking to comply with these requirements, shall be reviewed and evaluated by the Review Council, in light of the criteria set forth in Section VII. Compliance with these conditions will be monitored by the Affirmative Action Officer employed by the City of Camden.

1. Said Affirmative Action Officer will issue a written "Alert Notice" to a contractor and to appropriate unions whenever in his opinion, a breach of the above described conditions appear to be developing.

2. If the Alert Notice is not removed within three (3) working days by a correction of the deficiencies, the Affirmative Action Officer shall follow up the Alert Notice by issuing a written "Violation Notice". Upon the issuance of such notice, the contractor will have seven (7) working days to remove the violation. If the violation has not been removed within that period, the Camden Affirmative Action Officer will make recommendations to the Review Council of action to be taken by the City of Camden.

3. Either or both notices may be removed if the contractor meets his obligations under this ordinance or

if he presents a satisfactory explanation, in writing, as to why such compliance is impractical or impossible.

4. Compliance will be monitored by the Review Council or the officer so designated to act on its behalf.

5. Failure to satisfactorily remove the Violation Notice will be cause for the City of Camden, to,

a. Require the developer/contractor to enforce his obligations under his contract with contractors and sub-contractors by litigation at law or in equity, whichever is appropriate;

b. Withhold contract or grant payments;

c. Recommend termination or suspension of the contracts in whole or in part to the City Council;

d. Take all other actions available at law or in equity for the breach of a material condition of a contract.

XI. *Minority-owned Business Enterprise—Participation On Construction Contracts*

1. On all construction contracts in excess of $50,000.00 to be awarded by the City, the contractor will agree to make a good faith effort, as that phrase is defined in this sub-section, to use minority-owned business enterprises for not less than 25% of the total contract or grant amount.

2. Any contractor who does not meet the minimum level of 25% minority participation will be given an opportunity to display the "good faith" effort made towards meeting the goals of this Affirmative Action Program. For purposes of this sub-section, "good faith" effort shall be defined to include the following:

a. Informing associations, groups and organizations of bid specifications within a reasonable time of the closing date for bid submission.

b. Actively recruiting minority business enterprises to bid on sub-contracts.

c. Limiting the size and dollar volume of sub-contracts to the extent feasible and otherwise arranging solicitations and completion dates in order to make it possible for minority business enterprises to bid and compete for said contracts.

d. Upon receipt of a statement from a minority business enterprise, supported by an affidavit, that such enterprise is unable to obtain requisite bonding or insurance through normal channels, assuming the responsibility for meeting such requirements or otherwise making appropriate arrangements which shall eliminate these requirements as obstacles to the granting of the sub-contract to such minority business enterprise.

e. Soliciting minority participation through advertising in area publications, including minority publications.

f. Informing area non-profit minority organizations of opportunities.

g. Providing whatever other counselling or assistance as may be necessary during the preparatory stages and the actual performance of such sub-contracts.

h. Offering to assist minority business enterprises in entering into joint ventures with others for the purpose of accomplishing a total sub-contract, if they so desire.

3. In the event that the percentage of the contract and/or sub-contract work designated for minority-owned business enterprises is not at least 25% of the total

dollar volume of the contract and it is determined by the Affirmative Action Review Council that a "good faith" effort has not been made, it shall recommend to the Department of Administration and the particular department acting as the funding source, one or more of the following actions:

a. Hold a meeting of all parties to attempt an amicable resolution of the determination of non-compliance by the Council.

b. Require the contractor to comply with the terms of this ordinance through the appropriate legal action.

c. Withhold payments under any contract or grant which may be due or owing to any contractor.

d. Consider the breach of this agreement an act of irresponsibility by the contractor which the City may take into account in evaluating future bids by that contractor within the parameters of the Local Public Contract Law of the State of New Jersey, *N.J.S.A.* 40A-11-1, *et seq.*

The use of any or all of the above remedies shall rest within the discretion of the Business Administrator with the advice of any and all department heads which he deems fit. Failure to so act shall not be considered as a waiver of any provision or right contained within this ordinance.

XII. *Establishment of a Goal in Connection With the Award of Certain City Construction Contracts to Minority-Owned Business Enterprises*

a. The developer/contractor shall be ultimately responsible for assuring that 25% of the dollar cost of any contract exceeding $50,000.00 shall be awarded to a minority-owned business enterprise, as defined in this ordinance and as certified as such by the Review Council.

b. Within the parameters of the State's Public Bidding Laws, the City of Camden shall ensure that a fair and substantial portion of those publicly funded City construction contracts valued at less than $50,000.00, but in excess of $4,500.00, are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 35% of the total dollar amount of such contracts awarded annually.

c. Within the parameters of the State's Public Bidding Laws, the City of Camden shall ensure that a fair and substantial portion of publicly funded service and purchase contracts, valued at less than $4,500.00 are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 50% of the total dollar amount of such contracts awarded annually.

XIII. *Governmental Requirements*

It is expected that all contractors and/or developers will comply with any and all applicable federal or state requirements for equal opportunity, but compliance with the same shall, in no way, excuse any non-compliance with any specific requirements as set forth in the within ordinance.

SECTION 1. All ordinances or part of ordinances inconsistent with the provisions of this ordinance are hereby repealed as to such inconsistency only.

SECTION 2. At the direction of the State of New Jersey Department of Treasury and pursuant to State statute P.L. 1975, c.127, all persons who are subject to the terms and requirements of this ordinance are hereby required to meet the following standards of the State of New Jersey;

1. All contracts of $4,500.00 or more must include the mandatory contract language requirements of Subsection 3.4(a) of the Affirmative Action Regulations.

2. All advertisement and solicitation of construction contract bids must contain the following language: "Bidders are required to comply with P.L. 1975, c.127".

3. Any construction contractor or sub-contractor which submits appropriate evidence that it is operating under an existing federally approved or sanctioned affirmative action program shall be deemed to have satisfied the requirements of P.L. 1975, c.127.

4. Sub-contractors with four (4) or fewer employees are exempt from P.L. 1975, c.127.

5. On construction contracts of 2.5 million dollars or more, the City must set aside ½ of one percent of the total project cost to be used for outreach and training of minorities and females, if necessary, for the contractor to meet the hiring goals.

   (Article 7.5 of the Affirmative Action Regulations)

6. Compliance with the Affirmative Action Regulations of the Government of the United States or the State of New Jersey is not deemed to be compliance with this ordinance since it is the purpose of the City of Camden to adopt standards in excess of those set forth by the State of New Jersey and the Government of the United States.

SECTION 3. All members of the Affirmative Action Review Council and the Affirmative Action Officer of the City of Camden shall be domiciliaries of the City of Camden.

SECTION 4. This ordinance shall take effect twenty (20) days after final passage and publication as provided by law.

Dated: July 24, 1980

The above has been reviewed
and approved as to form.

By /s/ M. J. DICOLA
City Attorney

President
City Council

Mayor

Ordinance MC 1653 Adopted September 11, 1980

JJL:db
8-28-80

AN ORDINANCE AMENDING AN ORDINANCE ENTITLED, "AN ORDINANCE TO ESTABLISH AN AFFIRMATIVE ACTION PROGRAM IN CONNECTION WITH CONSTRUCTION CONTRACTS TO BE PERFORMED FOR OR ON BEHALF OF THE CITY OF CAMDEN", ADOPTED AUGUST 28, 1980

WHEREAS, the City Council of the City of Camden has adopted an Affirmative Action Progrem in connection with construction contracts to be performed for or on behalf of the City of Camden; and

WHEREAS, the City of Camden, by the City Council, seeks to make certain amendments to make the Program workable and feasiblie for the purposes it was adopted; now, therefore

BE IT ORDAINED by the City Council of Camden, as follows:

SECTION 1. The City Council hereby amends and supplements the following Sections of an Ordinance entitled, "An Ordinance To Establish An Affirmative Action Program In Connection With Construction Contracts To Be Performed For Or On Behalf Of The City Of Camden", adopted August 28, 1980. Any Section not herein amended or supplemented shall remain in full force and effect as originally drafted:

A. II. *Applicability of Ordinance*

Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial bene-

fit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply, except as provided in Section XII. The Director of the appropriate City Department granting or letting the contract will advise the appropriate state and federal agencies and officials of the standards set forth under this ordinance and request compliance with his ordinance. The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or more.

B. III. *Establishment of a Camden Affirmative Action Review Council*

In order to facilitate the implementation of this ordinance, there shall be established an Affirmative Action Review Council.

a. The Affirmative Action Review Council shall consist of seven (7) members and the composition of such Council shall consist of four (4) members who shall be appointed for a term of two (2) years and three (3) members who shall be appointed for a term of one (1) year; and, thereafter, members of such Council shall serve for a term of two (2) years.

b. Members of the Affirmative Action Review Council shall be appointed by the Mayor with the advice and consent of City Council. The appointing authority shall make every effort to include as part of the Affirmative Action Review Council representation from organized labor, contractor's associations, government and the minority community. The appointing and consenting authorities shall exercise due diligence and circumspection to ensure the appointment of individuals to the Affirmative Action Review Council who express a commitment to the

letter and spirit of the terms of this ordinance and the purposes and principles this ordinance seeks to advance.

C. IV. *Developer/Contractor's Contracting Obligations*

b. The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden.

c. The developer/contractor shall make every effort to meet the following goals for minority work utilization in all trades as tradesmen, journeymen and apprentices in performance of his/her contract, whether or not the work is contracted; 1980 twenty-five percent (25%) and 1980 and thereafter twenty-five percent (25%).

The above goals are expressed in terms of man-hours to be worked by minority members in trades and at every union/workman level or equivalent; however, in no event may the total man-hours worked by the minority members during the performance of the contract be less than the annual goals established above.

d. The developer/contractor shall ensure that any sub-contractor working on any part of the project under the sub-contract exceeding $25,000.00 and involving man-hours in excess of eighty (80) hours, per week for four (4) weeks, excluding hours worked by foremen, shall have ten percent (10%) of all journeymen hours worked by minority apprentices in each trade. This shall apply to all specialty trades or craft unions, but not limited to pneumatic tubing, cabinet makers/finishers, heating/electrical temperature controllers and curb and sidewalk installers.

D. VI. *Reporting Requirements*

d. *Contractor Monitoring.* The contractor shall continually monitor all personnel activities to ensure that the Affirmative Action Program is being carried out.

Criteria for Measuring Good Faith are as follows:

1. The contractor will consider for employment journeymen, basic trainees, advanced trainees and apprentices, persons referred to him by any training source approved by the Review Council. If the contractor does not employ any person so referred, he shall submit a written explanation by close of day to the Review Council.

2. Opportunities for minority participation in proposed projects will be submitted to the Affirmative Action Review Council who shall place notifications in area publications, including minority publications and non-profit minority organizations.

3. Information shall be supplied to all minority organizations who seek said information by request directed to the Affirmative Action Review Council.

4. A contractor shall not be deemed to have exercised good faith under this agreement solely because of union opposition, even if the unions threaten a work stoppage because of the implementation of this plan. It shall be incumbent upon the contractor, as employer, to see to it that referrals under this plan are treated fairly by the unions and their members.

5. If monitoring reveals significant non-compliance, the Affirmative Action Review Council will examine attempts at compliance measured by the criteria set forth under Section IV and Section VI of this ordinance and attempt to reach an amicable agreement within the parameters of this ordinance. Continued non-compliance, and a lack of an amicable solution thereto, shall result in a referral of the matter to the Department of Administration.

E. VII. *Union Statements*

Paragraph 2 is hereby deleted.

F. XI. *Minority-owned Business Enterprise—Participation On Construction Contracts*

2(d). Upon receipt of a statement from a minority business enterprise, supported by an affidavit, that such enterprise is unable to obtain requisite bonding or insurance through normal channels, the contractor shall aid and assist the minority business enterprise in procuring the requisite bonding by making any and all lawful and appropriate arrangements with a bonding or insurance company which would satisfy the bonding and/or insurance requirements so that the minority business enterprise could be granted the sub-contract which it seeks.

G. XII. *Establishment Of Goals In Connection With The Award Of Certain Construction Contracts To Minority-Owned Business Enterprises And Purveyors Of Goods And Services*

SECTION 2. All ordinances or parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed as to such inconsistency only.

SECTION 3. This ordinance shall take effect twenty (20) days after final passage and publication as provided by law.

Dated: August 28, 1980

The above has been reviewed
and approved as to form.

/s/ LAURENCE E. ROSOFF
City Attorney

President
City Council

Mayor

APPENDIX D

DEPARTMENT OF LAW
THE CITY HALL
CAMDEN, NEW JERSEY 08101

Laurence E. Rooff
City Attorney
Michael J. DiCola
1st Assistant City Attorney

Stephen W. Lusardi
Timothy P. Inemer
Assistant City Attorneys
In reply please refer to
File No.

November 14, 1980

Mr. Carl G. Briscoe
Chief Affirmative Action Officer
State of New Jersey
Department of the Treasury
State House
Trenton, New Jersey 08625

Re: *City of Camden Affirmative Action Ordinance*

Dear Mr. Briscoe:

Pursuant to your request, enclosed please find the following material:

(1) An Ordinance to Establish an Affirmative Action Program in connection with construction contracts to be performed for or on behalf of the City of Camden, dated July 24, 1980.

(2) An Ordinance amending the above entitled Ordinance, dated August 28, 1980.

The enclosed ordinances constitute the Affirmative Action Program as adopted by Camden City Council.

It is my understanding that you will review said Ordinances with respect to their compliance with P.L. 1975, c. 127.

If I can be of further assistance, please feel free to contact me.

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
STATE HOUSE
TRENTON, NEW JERSEY 08625

November 24, 1980

Mr. Stephen W. Lusardi
First Assistant City Attorney
Department of Law
City Hall
Camden, N.J. 08101

Dear Mr. Lusardi:

This is to acknowledge that the Affirmative Action Program for construction contractors contained in the City of Camden ordinances dated July 24, 1980 and August 28, 1980 submitted to this office November 14, 1980, meets the minimum requirements of the State Affirmative Action Program. In accordance with Article 6.5 of the Affirmative Action Regulations pursuant to P.L. 1975, c. 127, your program is designated a State Approved Public Agency Affirmative Action Program for the period of November 24, 1980 through November 24, 1981.

Since your program only applies to contracts of more than $50,000, it is expected that the State's regulations and procedures will apply to contracts of $50,000 or less.

Please be reminded that the Affirmative Action Office may review the operation of a State approved program.

Sincerely,

Carl G. Briscoe
Chief Affirmative Action Officer

CGB:rs

cc: Mr. T. Caston, City Affirmative Action Officer
Rev. Eichelberger, Citizen's Coalition
Mr. S. Kudatzki, Attorney, South Jersey Bldg. Trades Assoc.

APPENDIX E

17:27-6.5 State-approved public agency affirmative action construction programs

(a) Notwithstanding any other provisions of this subchapter, a public agency may establish its own affirmative action program for construction contracts and submit said program to the affirmative action office for designation as a State-approved affirmative action construction program. Any public agency program so designated, in accordance with the provisions of this section, shall exclusively establish the State affirmative action procedures and requirements which implement P.L. 1975, c. 127, as amended and supplemented from time to time, as applied to construction contracts and subcontracts involving said public agency.

(b) The affirmative action office may designate a public agency's affirmative action construction program as State-approved only if the program requires the public agency's construction contracts to conform to the mandatory contract language requirements of N.J.A.C. 17:27-3.4 (a), except for the language contained in provision (4) of said subsection; said program requires the public agency's advertisement and solicitation of construction contract bids to contain the following language: "Bidders are required to comply with the requirements of P.L. 1975, c. 127,"; and said program establishes an employment goal which is not lower than the applicable goal established by subchapter 7 of this chapter.

(c) Any construction contractor or subcontractor which submits appropriate evidence that it is operating under an existing federally approved or sanctioned affirmative action program to a public agency, including a public agency which is operating under its own State-approved

affirmative action construction program, shall be deemed to have satisfied the affirmative action requirements of P.L. 1975, c. 127. The determination of the affirmative action office as to what constitutes such appropriate evidence shall be binding.

(d) To obtain the designation for its program as State-approved, a public agency shall submit to the affirmative action office a complete description of its program, copies of the relevant forms and administrative and regulatory documents, and any other information requested by the affirmative action office. Within 60 days of receiving all necessary information, the affirmative action office shall either designate a public agency affirmative action program as State-approved for one year, reject said program, or condition a one year approval designation on the public agency making certain modifications in its program. Any change which a public agency intends to make in such a State-approved program shall first be submitted in writing to the affirmative action office and to be approved by the affirmative action office in writing at its discretion. Any change to a State-approved program made without the written approval of the affirmative action office shall terminate the State approval. Within 60 days prior to the expiration of a State-approval of a public agency's affirmative action construction program, the public agency may seek a one year renewal of the State approval in accordance with the procedure prescribed by this subsection for obtaining an initial State approval.

(e) The affirmative action office may review the operation of any State-approved program; and where appropriate may issue a written notice of termination. Any such termination shall become effective no sooner than 50 days after said written notice is issued and only if the affirmative action office has afforded the administrators of the program an opportunity for an informal hearing.